No. 481

Office Supreme Court, U.S.
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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 13756.

VIKING THEATRE CORPORATION,

Appellant,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

JOINT APPENDIX.

Volume I (Pages 1a to 468a).

WILLIAMS & STEIN,
1000 Hill Building,
Washington 6, D. C.
DRINKER BIDDLE & REATH,
1100 Philadelphia Nat'l Bank Bldg.,
Philadelphia 7, Pa.

EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,
HENRY W. SAWYER, III,
R. PHILIP STEINBERG,
DAVID W. MAXEY,
Attorneys for Viking Theatre Corporation, Appellant.

PHILLIPS, NIZER, BENJAMIN, KRIM AND BALLON,
Paramount Building,
New York, N. Y.
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Bldg.,
Philadelphia 2, Pa.

LOUIS NIZER,
GERALD F. PHILLIPS,
ALBERT F. SMITH,
WM. A. SCHNADER,
W. BRADLEY WARD,
ARLIN M. ADAMS,
BANCROFT D. HAVILAND,
SHIRLEY S. BITTERMAN,
Attorneys for Appellees Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Paramount Film Distributing Corporation.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor, Packard Bldg.,
Philadelphia 2, Pa.

LOUIS J. GOLEMAN,
Attorney for Appellee Warner Bros. Pictures Distributing Corporation.
MORRIS WOLF,
FRANKLIN POOL,
Attorneys for Appellees Stanley Warner Management Corporation and Stanley Company of America.

MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pa.
ROYALL, KOEGEL & ROGERS,
100 Broadway,

ARTHUR LITTLETON,
RALPH EARLE II,
CHARLES F. YOUNG,
Attorneys for Appellees Twentieth

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RELEVANT DOCKET ENTRIES.

Nov. 13, 1956. Complaint filed.

Nov. 13, 1956. Summons exit.

Nov. 13, 1956. Plaintiff's demand for jury trial, filed.

Nov. 29, 1956. Summons returned "on November 20, 1956 served" and filed.

Dec. 10, 1956. Answer of Warner Bros. Pictures Distributing Corporation filed.

Dec. 10, 1956. Answer of Stanley Warner Management Corp. and Stanley Co. of America, filed.

Dec. 11, 1956. Appearance of Bernard G. Segal, Esq., W. Bradley Ward Esq. and Arlin M. Adams, Esq., for Paramount Film Distributing Corp. Columbia Pictures Corp. Universal Film Exchanges, Inc., United Artists Corp., RKO Teleradio Pictures, Inc., Twentieth Century-Fox Film Corp. and Loew's Inc., filed.

Dec. 11, 1956. Answer of William Goldman Theatres, Inc. filed.

Dec. 14, 1956. Answer of Twentieth Century-Fox Film Corp., filed.

Dec. 14, 1956. Answer of Columbia Pictures Corp., filed.

Dec. 14, 1956. Answer of Loew's Incorporated, filed.

Dec. 14, 1956. Answer of Paramount Film Distributing Corp., filed.

Dec. 14, 1956. Answer of United Artists Corp., filed.

Dec. 17, 1956. Answer of RKO Teleradio Pictures, Inc. filed.

Dec. 17, 1956. Answer of Universal Film Exchanges Inc. filed.

Jan. 15, 1957. Answer of Fox Philadelphia Building, Inc., filed.

Jan. 15, 1957. Appearance of Arthur Littleton and John M. Schaeffer, Jr., Esqs. for Fox Philadelphia Building Inc., filed.

Aug. 26, 1959. Initial pre-trial Order directing plaintiff to file a memorandum by October 14, 1959 and that defendant file a memorandum by November 27, 1959 and fixing December 1, at 2:15 P. M. for further pre-trial conference and fixing December 23, 1959 at 10 A. M. for argument etc., filed. Noted—notice mailed 8/27/59. JWL.

Oct. 14, 1959. Plaintiff's pre-trial memorandum filed.

Dec. 2, 1959. Second pre-trial order amending Initial pre-trial order filed. 12-3-59 noted & notice mailed. L.

Dec. 22, 1959. Distributor defendants' pre-trial statement filed.

Dec. 22, 1959. Pre-trial memorandum of Fox Philadelphia Building Inc. filed.

Dec. 22, 1959. Pre-trial memorandum of Stanley Warner Management Corporation and Stanley Company of America filed.

Dec. 29, 1959. Pre-trial conference. Lord.

Jan. 11, 1960. Third-pre-trial Order filed. 1-12-60 noted and copies mailed. L.

Jan. 28, 1960. Argument on certain issues re: pre-trial order CAV. Lord.

Feb. 26, 1960. Fourth pre-trial Order, Lord J. filed. Noted and notice mailed 2/29/60.

Mar. 7, 1960. Defendants' motion for clarification of 4th pre-trial order, filed.

Mar. 30, 1960. Order of Court denying defendants' motion for clarification of 4th pre-trial order, filed. 3-31-60 noted & notice mailed. L.

July 26, 1960. Fifth pre-trial Order, Lord, J., filed. 7-27-60 noted and notice mailed.

Sept. 2, 1960. Sixth pre-trial Order, Lord, J., filed. 9-6-60 noted and notice mailed.

Oct. 10, 1960. Jury and alternates called and sworn. Trial.

Oct. 11, 1960. Trial resumed.

Oct. 13, 1960. Juror withdrawn—case continued.

Oct. 13, 1960. Appearance of Henry W. Sawyer, III, Esq. for plaintiff filed.

Oct. 25, 1960. Withdrawal of appearance of Dilworth, Paxson, Kalish, Kohn & Dilks, Esq. for plaintiff, filed.

May 15, 1961. Jury and alternates called and sworn. Trial.*

June 19, 1961. Jury present—case recessed to 6/20/61 due to illness of a juror.

June 28, 1961. Trial resumed.

Eo Die: Defendants move to dismiss and for summary judgment—Argued.

July 7, 1961. Trial resumed.

The Court denies motions of all defendants for summary judgment.

Motion of RKO Teleradio Pictures, Inc., etc., for a directed verdict GRANTED.

Decision reserved on motions of United Artists Corp. Universal Film Exchanges, Inc., and Fox-Phila., Building Inc., for directed verdict.

Motions for directed verdict by all other defendants are denied.

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* The trial continued until July 19, 1961, uninterrupted except for a recess due to illness of a juror, and recesses for argument on certain motions.

July 7, 1961. Judgment in favor of RKO Teleradio Pictures, Inc., etc., against Plaintiff, with costs, filed. 7-10-61. Noted & Notice Mailed.

July 14, 1961. Trial resumed—continued to 7-17-61 for arguments re motions to dismiss (jury excused until 7-19-61).

July 19, 1961. Trial resumed.

Eo Die: Defts. motions for directed verdict—granted.

July 19, 1961. Verdict: Judgment in favor of defendants and against plaintiff.

July 19, 1961. Judgment in favor of defendants and against plaintiff, with costs, filed. 7-20-61 noted & copies mailed.

COMPLAINT.

1. Plaintiff, Viking Theatre Corporation, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business at 19th and Chestnut Streets, Philadelphia, Pennsylvania, where it operates the Viking Theatre.

2. Defendants, Paramount Film Distributing Corporation, Columbia Pictures Corporation; Universal Film Exchanges, Inc., United Artists Corporation, RKO Teleradio Pictures, Inc. (formerly RKO Radio Pictures, Inc.), Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation and Loew's, Incorporated, more fully described hereafter, are engaged in the business of distributing motion pictures for exhibition at theatres, inter alia, in Philadelphia. Said distribution is in interstate commerce. Most of the films distributed by said distributors are made in Hollywood, California, and the headquarters of said defendants are all in New York City, New York.

3. Defendants, Stanley-Warner Management Corp. and Stanley Company of America, are engaged in the business of exhibiting motion pictures in Philadelphia, Pennsylvania, and elsewhere, having their principal Philadelphia offices and places of business at 1300 Arch Street, Philadelphia. They operate the following first-run theatres in downtown Philadelphia; the Mastbaum, the Stanley, the Stanton, and they also operate the Boyd, which at present exhibits Cinerama exclusively. Said defendants also operate 40 theatres in the Philadelphia exchange area and 275 theatres nationally. Until March 1, 1953, said defendants were affiliates of defendant, Warner Bros. Pictures Distributing Corporation, and since then have been operated by the same management in Philadelphia as they were before, and have continued to have the same dominant position in the industry and the same buying power.

4. Defendant, William Goldman Theatres, Inc., is engaged in the business of exhibiting motion pictures in Philadelphia and elsewhere, having its principal office and place of business at 15th and Chestnut Streets, Philadelphia. It operates the following first-run theatres in downtown Philadelphia: the Goldman, the Randolph and the Midtown. Said defendant in addition operates 13 theatres in the Philadelphia exchange area and also occupies a dominant position in the industry in that area.

5. Defendant, Fox Philadelphia Building, Inc., is a Pennsylvania corporation, having its principal office and place of business at 16th and Market Streets in Philadelphia, where it operates the Fox Theatre. Said defendant was formerly an affiliate of defendant, Twentieth Century-Fox Film Corporation or its predecessors.

6. At all times material hereto, the Viking Theatre has been what is described by the defendant distributors as a "showcase" worthy of exhibiting said defendants' quality first-run pictures in Philadelphia. The Viking is in an excellant location for a first-run motion picture theatre in Philadelphia having a tremendous potential for attracting motion picture theatre patrons not only in the evening but also at matinees and, in fact, at all times when the theatre is open to the public.

7. Defendant distributors dominate the motion picture distributing industry and plaintiff must rely on said defendants for the licensing of a continuous flow of quality motion picture films to be exhibited at the Viking Theatre, which are essential to enable that theatre to stay in business.

8. On or about April 8, 1954, plaintiff advised each and every one of the defendants that the Viking Theatre was opening for first-run exhibition after complete renovation, redecoration and air-conditioning, having been equipped with the latest cinemascope equipment and stereophonic sound, and that it desired to share in the first-run distribu-

tion of the defendants' product in central city Philadelphia. The Viking Theatre actually opened for operation on July 2, 1954.

9. From the inception of plaintiff's operation of the Viking Theatre, as herein alleged, the defendants have engaged in a conspiracy in restraint of trade in violation of the anti-trust laws of the United States against the plaintiff, designed to harass the plaintiff and to impede the plaintiff's ability to compete with the first-run central city Philadelphia theatres operated by the defendant exhibitors, with the ultimate objective of putting the plaintiff out of business as a motion picture exhibitor and as a competitor of the defendant exhibitors. Pursuant to and for the purpose of carrying out that conspiracy, the defendant distributors, with the knowledge and acquiescence of the defendant exhibitors and in conspiracy with them and for the benefit of the defendant exhibitors, have performed the following acts:

(a) Refused to accept offers made by plaintiff even where plaintiff's offers were the best offers received by defendants.

(b) Disclosed some of plaintiff's offers to defendant exhibitors to enable defendant exhibitors to top those offers.

(c) Required plaintiff to bid for pictures without requiring bidding from the defendant exhibitors.

(d) Allocated pictures to the defendant exhibitors without allocating an equal proportion to the plaintiff.

(e) Required plaintiff to submit offers in writing without requiring the same of defendant exhibitors.

(f) Arbitrarily rejected plaintiff's offers and then negotiated privately to allocate pictures to the defendant exhibitors.

(g) Manipulated availability dates on pictures in favor of defendant exhibitors.

(h) Refused convenient and timely screenings to the plaintiff while granting such screenings to the defendant exhibitors.

(i) Adjusted film rentals for the defendant exhibitors, but refused similar adjustments for the plaintiff.

(j) Adjusted playing time for the defendant exhibitors, but refused similar adjustments for the plaintiff.

(k) Granted discriminatory advertising deals to the defendant exhibitors, but refused them to the plaintiff.

(l) Required plaintiff to license pictures which it did not need or want as a condition of getting pictures which it did need and want.

(m) Forced the plaintiff to bid exorbitant and unconscionable amounts as a condition of getting licenses for pictures.

10. In addition as part of the conspiracy certain of the defendants have instituted legal proceedings against the plaintiff in bad faith as a means of further harassing the plaintiff, including the following actions:

Universal Film Exchanges, Inc. v. Viking Theatre Corporation, Court of Common Pleas No. 2 of Philadelphia County, June Term, 1956, No. 5379;

Loew's, Inc. v. Viking Theatre Corporation, Court of Common Pleas No. 7 of Philadelphia County, June Term, 1956, No. 8097;

Twentieth Century-Fox Film Corporation v. Viking Theatre Corporation, Court of Common Pleas No. 3 of Philadelphia County, June Term, 1956, No. 7497.

11. First-run pictures are the cream of the motion picture business and a continuous and proper flow of quality first-run pictures is the life blood of a quality motion picture theatre such as the Viking. Such a continuous flow of product is necessary to establish box office momentum

required to enable the theatre to operate with its maximum efficiency and potential. Such a flow of product has been denied the Viking Theatre as a result of the conspiracy herein alleged, and the acts and practices herein alleged performed by the defendants pursuant to that conspiracy.

12. As a result of said conspiracy, plaintiff has suffered irreparable injury, and unless the conspiracy is enjoined will continue to suffer irreparable injury because the Viking Theatre will be forced to continue to operate without the continuous flow of quality first-run pictures which it deserves and which it would enjoy in a market free of the restraint of defendants' conspiracy. Said conspiracy is against the public interest and public policy.

13. Paramount Film Distributing Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 1501 Broadway, New York City, New York; is engaged in distribution of motion pictures throughout the United States; has an agent and transacts business in the eastern district of Pennsylvania; and has an office at 248 North 12th Street, Philadelphia, Pennsylvania.

14. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 729 Seventh Avenue, New York City, New York; distributes motion pictures in various parts of the United States and foreign countries; has an agent and transacts business in the eastern district of Pennsylvania and has an office at 302 North 13th Street, Philadelphia, Pennsylvania.

15. Universal Film Exchanges, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 445 Park Avenue, New York City, New York; distributes motion pictures in various parts of the United States and foreign countries; has an agent and transacts business in the eastern

district of Pennsylvania and has an office at 251 North 13th Street, Philadelphia, Pennsylvania.

16. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 729 Seventh Avenue, New York City, New York; distributes motion pictures in various parts of the United States and foreign countries; has an agent and transacts business in the eastern district of Pennsylvania and has an office at 1322 Vine Street, Philadelphia, Pennsylvania.

17. RKO Teleradio Pictures, Inc. (formerly RKO Radio Pictures, Inc.), is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 1270 Avenue of the Americas, New York City, New York; produces and distributes motion pictures in various parts of the United States and foreign countries; has an agent and transacts business in the eastern district of Pennsylvania; and has an office at 1225 Vine Street, Philadelphia, Pennsylvania.

18. Warner Bros. Pictures Distributing Corporation is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business at 321 West 44th Street, New York City, New York; distributes motion pictures in various parts of the United States and foreign countries; has an agent and transacts business in the eastern district of Pennsylvania; has an office at 230 North 13th Street, Philadelphia, Pennsylvania; and until February 28, 1953, was a subsidiary of Warner Bros. Pictures, Inc., a Delaware corporation incorporated in 1923, and since dissolved.

19. Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 444 West 56th Street, New York City, New York, and is engaged in the business of producing and distributing motion pictures in interstate commerce either directly or

through subsidiary or associated companies, in various parts of the United States and in foreign countries, and has an agent and transacts business in the eastern district of Pennsylvania and has an office in said district and state at 314 North 13th Street, Philadelphia, Pennsylvania. It has succeeded as assignee of all of the liabilities of Twentieth Century-Fox Film Corporation, a New York corporation (hereinabove referred to as its predecessor).

20. Loew's Incorporated is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 1540 Broadway, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries, and has an agent and transacts business in the eastern district of Pennsylvania and has an office in said district and state at 250 North 13th Street, Philadelphia, Pennsylvania.

21. This action is brought under Sections 4 and 16 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for Other Purposes", as amended and supplemented (15 USCA 15, 26), commonly known as the Clayton Act, and under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" (15 USCA 1 and 2), said Act being commonly known as the Sherman Act.

22. As a result of defendants' conspiracy, plaintiff has suffered damages to date in an amount in excess of $600,000.

WHEREFORE, plaintiff demands:

(a) That treble damages be awarded to plaintiff and against defendants in the sum of at least $1,800,000, together with counsel fee and costs.

(b) That defendants and each of them be enjoined from conspiring or carrying out any acts or conduct pursuant to any conspiracy to interfere with plaintiff's rights to license motion pictures in a free and untrammeled market and under terms and conditions free from discrimination in favor of defendant exhibitors.

(c) That defendants and each of them be enjoined from conspiring to impede plaintiff's operation of the Viking as a first-run theatre.

(d) Such other and further relief as shall be just and proper.

DILWORTH, PAXSON, KALISH & GREEN,

By HAROLD E. KOHN,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia 9, Pa.,
Attorneys for Plaintiff.

November 12, 1956

ANSWER OF PARAMOUNT FILM DISTRIBUTING CORPORATION TO PLAINTIFF'S COMPLAINT.

Defendant, Paramount Film Distributing Corporation, through its counsel, hereby answers the complaint in this matter, as follows:

First Defense.

1. This defendant believes that plaintiff has some connection with the Viking Theatre located at 19th and Chestnut Streets, Philadelphia, Pennsylvania, but is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 1 of plaintiff's complaint.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the complaint insofar as they relate to the other defendants; admits the allegations of paragraph 2 of the complaint insofar as they relate to it, except it avers that some phases only of its distribution of motion pictures are in interstate commerce.

3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the complaint except it believes that Stanley-Warner Management Corporation has some connection with the exhibition of motion pictures and has or has had some connection with the Mastbaum, Stanley, Stanton and Boyd Theatres.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the complaint except that it admits that William Goldman Theatres, Inc. has some connection with the exhibition of motion pictures, has an office and place of business at 15th and Chestnut Streets, Philadelphia, Penn-

sylvania, and has some connection with the Goldman, Randolph and Midtown Theatres.

5. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 5 and 6 of the complaint except it admits that the Fox Theatre is located at 16th and Market Streets, Philadelphia, Pennsylvania and that it believes that the Viking Theatre is well located.

6. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the complaint except it denies that it dominates the motion picture distribution industry.

7. This defendant admits the allegations of paragraph 8 of plaintiff's complaint that in April, 1954 it was advised that the Viking Theatre was re-opening; that it wished to license this defendant's product in central Philadelphia; that the Viking Theatre had cinemascope and stereophonic sound equipment; that it had been renovated and re-conditioned; and that it was air-conditioned. This defendant admits that the Viking Theatre opened for operation in July, 1954. This defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 8 of plaintiff's complaint.

8. This defendant denies the allegations of paragraphs 9, 10, 11, 12 and 22 of plaintiff's complaint.

9. This defendant admits the allegations of paragraph 13 of plaintiff's complaint.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 14, 15, 16, 17, 18, 19 and 20 of plaintiff's complaint.

11. This defendant admits that plaintiff seeks to invoke the jurisdiction of this court under the statutes specified in

paragraph 21 of the complaint, but this defendant denies that it has violated these statutes, or any of them and denies that it is liable to plaintiff by reason of these statutes or for any other reason.

SECOND DEFENSE.

The complaint fails to state a claim against this defendant upon which relief can be granted.

WHEREFORE, this defendant prays for judgment dismissing the complaint, and assessing upon plaintiff all costs and disbursements of this action.

ARLIN M. ADAMS,
Attorney for Paramount Film Distributing Corporation.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania.

[The Answers of Columbia Pictures Corporation, Loew's Incorporated (now Metro-Goldwyn-Mayer, Inc.), United Artists Corporation, and Universal Film Exchanges, Inc., are substantially the same as the Answer of Paramount Film Distributing Corporation.

[The Answer of Twentieth Century-Fox Film Corporation is substantially the same as the Answer of Paramount Film Distributing Corporation, with the exception of paragraphs 5 and 9, which are set forth below:

"5. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 5 and 6 of the complaint except it admits that the Fox-Theatre is located at 16th and Market Streets, Philadelphia, Pennsylvania and it believes that the Viking Theatre is well

located, and except it denies Fox Philadelphia Building, Inc. was at any time connected with it.

* * *

"9. This defendant denies the allegations of paragraph 19 of the complaint except it admits that it is a corporation organized and existing under the laws of the State of Delaware, that it had its principal place of business at 444 West 56th Street, New York, New York, that it is in the business of producing motion pictures and distributing motion pictures in various parts of the United States and that certain phases of its distribution are in interstate commerce, that it has an agent and transacts business in the eastern district of Pennsylvania, and has an office located at 314 North 13th Street, Philadelphia, Pennsylvania."]

ANSWER OF WARNER BROS. PICTURES DISTRIBUTING CORPORATION.

FIRST DEFENSE.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint, except that it is admitted that there is a motion picture theatre known as the Viking Theatre at 19th & Chestnut Streets, Philadelphia, Pennsylvania, and that plaintiff has some interest therein.

2. It is admitted, in answer to the allegations of paragraph 2 of the complaint, that certain aspects of the business of distributing motion pictures involve interstate commerce, that this defendant is engaged in the business of distributing motion pictures for exhibition, inter alia, in Philadelphia, that most of said motion pictures are produced in California, and that the principal place of business of this defendant is in New York City.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the complaint insofar as they relate to other defendants, except that it admits on information and belief that there are or were companies of the names stated in said paragraphs, or of similar names, engaged in some phase or phases of the motion picture business.

3. The allegations of paragraphs 3 and 18 of the complaint are denied, except that it is alleged that this defendant was until February 28, 1953, a wholly owned subsidiary of Warner Bros. Pictures, Inc. (a Delaware corporation incorporated 1923, dissolved), which company also had other subsidiaries engaged in the operation of the theatres named in paragraph 3 of the complaint, that it is a New York corporation having its principal place of business at 321 West 44th Street, New York, and that it transacts business in the Eastern District of Pennsylvania

and maintains an office at 230 North 13th Street, Philadelphia, Pennsylvania; and it is admitted on information and belief that Stanley Warner Management Corporation and Stanley Company of America have some connection with the Mastbaum, Stanley, Stanton, and formerly the Boyd, Theatres in Philadelphia, Pennsylvania, as well as other theatres in Philadelphia and elsewhere, and have offices at 1300 Arch Street, Philadelphia, Pennsylvania.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except that it admits on information and belief that defendant William Goldman Theatres, Inc. has some connection with the Goldman, Randolph and Midtown Theatres, and other theatres in Philadelphia.

5. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the complaint, except that it is admitted on information and belief that Fox Philadelphia Building, Inc. has some connection with the Fox Theatre.

6. The allegations of paragraph 6 of the complaint are denied. It is alleged that the Viking theatre is one of a number of theatres in the City of Philadelphia which are in varying degrees suitable for the exhibition of motion pictures on first run.

7. The allegations of paragraphs 7, 9, 11, 12 and 22 of the complaint are denied.

8. It is admitted that on April 8, 1954 plaintiff's attorney advised this defendant that said theatre was being renovated, redecorated, air-conditioned and equipped with cinemascope equipment and stereophonic sound, that said theatre would be opened on or about May 8, 1954, and that plaintiff desired to share or bid upon the product of this defendant for exhibition in central city Philadelphia; and that said theatre opened on or about July 2, 1954. This defendant is without knowledge or information sufficient to form

a belief as to the truth of the remaining allegations of paragraph 8 of the complaint.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the complaint, except that it is denied that this defendant was party to any conspiracy.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 13, 14, 15, 16, 17, 19 and 20 of the complaint, except that it admits on information and belief, that there are or were companies of the names stated in said paragraphs, or of similar names, engaged in some phase or phases of the motion picture business.

11. This defendant admits that plaintiff seeks to invoke the jurisdiction of this Court under the statutes specified in paragraph 21 of the complaint, but this defendant denies that it has in any way violated, or is violating, or intends to violate any of such statutes, or that it is liable to plaintiff by reason of said statutes, or for any other reason.

SECOND DEFENSE.

The complaint fails to state a claim against this defendant upon which any relief may be granted.

WHEREFORE, this defendant prays judgment dismissing the complaint and assessing against the plaintiff all costs and disbursements of this action.

LOUIS J. GOFFMAN,
Louis J. Goffman,
Attorney for Warner Bros. Pictures Distributing Corporation.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor Packard Bldg.,
Philadelphia 2, Penna.

ANSWER OF STANLEY WARNER MANAGEMENT CORPORATION AND STANLEY COMPANY OF AMERICA.

FIRST DEFENSE.

1. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint, except that it is admitted that there is a motion picture theatre known as the Viking Theatre at 19th & Chestnut Streets, Philadelphia, Pennsylvania, and that plaintiff has some interest therein.

2. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 2, 13, 14, 15, 16, 17, 18, 19 and 20 of the complaint, except that they admit, on information and belief, that there are or were companies of the names stated in said paragraphs, or of similar names, engaged in some phase or phases of the motion picture business, and that certain aspects of the business of distributing motion pictures involve interstate commerce, and most motion pictures distributed in the United States are produced in California.

3. The allegations of paragraph 3 of the complaint are denied, except that it is alleged that defendant Stanley Company of America is engaged in the business of exhibiting motion pictures in Philadelphia and elsewhere, that defendant Stanley Warner Management Corporation is engaged in the business of furnishing services to motion picture theatres in Philadelphia and elsewhere, that they respectively operate and render services to the Mastbaum, Stanley and Stanton Theatres, and formerly the Boyd, which at present is being used for Cinerama exclusively; that until February 28, 1953, they were subsidiaries of Warner Bros. Pictures, Inc. (a Delaware corporation incorporated 1923, since dissolved), not a defendant herein; and that defend-

ant Warner Bros. Pictures Distributing Corporation was also a subsidiary of said company.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except that they admit on information and belief that defendant William Goldman Theatres, Inc. has some connection with the Goldman, Randolph and Midtown Theatres, and other theatres in Philadelphia.

5. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the complaint, except that it is admitted on information and belief that Fox Philadelphia Building, Inc. has some connection with the Fox Theatre.

6. The allegations of paragraphs 6, 7, 9, 11, 12 and 22 of the complaint are denied.

7. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8.

8. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the complaint, except that it is denied that these defendants have taken part in any conspiracy.

9. These defendants admit that plaintiff seeks to invoke the jurisdiction of this Court under the statutes specified in paragraph 21 of the complaint, but these defendants deny that they have in any way violated, or are violating, or intend to violate any of such statutes, or that they are liable to plaintiff by reason of said statutes, or for any other reason.

SECOND DEFENSE.

The complaint fails to state a claim against these defendants upon which any relief may be granted.

WHEREFORE, these defendants pray judgment dismissing the complaint and assessing against the plaintiff all costs and disbursements of this action.

LOUIS J. GOFFMAN,
Louis J. Goffman,
Attorney for Stanley Warner Management Corporation and Stanley Company of America.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor Packard Bldg.,
Philadelphia 2, Penna.

ANSWER OF FOX PHILADELPHIA BUILDING, INC. TO THE COMPLAINT.

Defendant Fox Philadelphia Building, Inc., by its attorneys, hereby answers the complaint in this matter as follows:

First Defense.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint, except that it admits that the Viking theatre is located at Nineteenth and Chestnut Streets in Philadelphia, Pennsylvania.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint, except that it admits for the purpose of this action so much of such allegations as are admitted by the defendants described therein.

3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except that it believes that the defendants described therein have some connection with the exhibition of motion pictures and have or have had some connection with the Mastbaum, Stanley, Stanton and Boyd theatres.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except that it admits that William Goldman Theatres, Inc., has some connection with the Goldman, Randolph and Midtown theatres.

5. This defendant denies the allegations contained in paragraph 5 of the complaint, except that it admits that it

is a New York corporation, that it has an office at Sixteenth and Market Streets in Philadelphia, Pennsylvania, that it operates the Fox Theatre in Philadelphia and that prior to September 27, 1952, it was an indirect subsidiary of Twentieth Century-Fox Film Corporation, a New York corporation.

6. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 of the complaint.

7. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint, except that it denies that the demand referred to in said paragraph 8 was made upon it.

8. This defendant denies the allegations contained in paragraphs 9, 9(a), 9(b), 9(c), 9(d), 9(e), 9(f), 9(g), 9(h), 9(i), 9(j), 9(k), 9(l), 9(m), 11, 12 and 22 of the complaint.

9. This defendant denies the allegations contained in paragraph 10 of the complaint so far as such allegations relate or are intended to relate to it.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, 15, 16, 17, 18, 19 and 20 of the complaint, except that it admits for the purpose of this action so much of the allegations contained therein as are admitted by the defendants described therein.

11. Answering paragraph 21 of the complaint, this defendant admits that plaintiff purports to invoke the jurisdiction of this Court and to bring this action under the statutes enumerated but denies that it has violated any of such statutes and denies that it has done any act which caused any damage to the plaintiff or otherwise.

SECOND DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Fox Philadelphia Building, Inc., prays judgment dismissing the complaint, and assessing against plaintiff all costs and disbursements of this action.

JOHN N. SCHAEFFER, JR.,
John N. Schaeffer, Jr.,
Attorney for Fox Philadelphia Building, Inc.

MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Tr. Bldg.,
Philadelphia 9, Pennsylvania,
Of Counsel.

January 15, 1957

ANSWER TO COMPLAINT BY WILLIAM GOLDMAN THEATRES, INC.

FIRST DEFENSE.

1. This defendant admits the averments of paragraphs 1, 2, 3, 5, 7, 13, 14, 15, 16, 17, 18, 19 and 20.

2. This defendant admits the averments of paragraph 4 of the complaint except that it avers it operates 12 not 13 theatres in the Philadelphia exchange area and that it occupies a prominent rather than a dominant position in the motion picture industry there.

3. This defendant denies the averments of paragraphs 6, 9 and 12.

4. This defendant denies the averments of the first sentence of paragraph 8 of the complaint as to itself and is without knowledge or information sufficient to form a belief as to the truth of the said averments as to the other defendants.

5. This defendant is without knowledge sufficient to form a belief as to the truth of the averments contained in paragraph 10 of the complaint.

6. This defendant admits the averments of the first two sentences of paragraph 11 of the complaint except that it denies that the Viking Theatre is a quality motion picture theatre and denies the averments of the last sentence of the said paragraph.

7. As to paragraphs 21 and 22 of the complaint this defendant admits the plaintiff seeks to invoke the jurisdiction of the Court under the statutes specified, but this defendant denies that it has violated, is violating or intends to violate such statutes or any of them and further denies that it is liable to plaintiff for reason of such statutes or for any other reason.

SECOND DEFENSE.

The complaint fails to state a claim against this defendant upon which relief may be granted.

WHEREFORE, this defendant prays judgment dismissing the complaint and assessing against plaintiff all costs and disbursements of this action.

EDWIN P. ROME,
Edwin P. Rome,
Attorney for William Goldman Theatres, Inc.

VIKING THEATRE CORPORATION ANSWERS TO INTERROGATORIES

[Filed May 7, 1959]

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1. During the period from January 1, 1954 to November 13, 1956, the Viking Theatre Corporation made bids or offers on each of the following motion pictures:

(a) Each picture listed in answer to interrogatory 6;

(b) Each picture listed in answer to interrogatory 4; and

(c) PARAMOUNT: THE PROUD AND THE PROFANE, THE DESPERATE HOURS, THE MAN WHO KNEW TOO MUCH; UNITED ARTISTS: TRAPEEZE, THE MAN WITH THE GOLDEN ARM, MARCIANO-MOORE FIGHT; TWENTIETH CENTURY-FOX: THE KING AND I, LOVE ME TENDER; LOEW'S: TEAHOUSE OF THE AUGUST MOON, THE OPPOSITE SEX, HIGH SOCIETY, TRIAL, IT'S ALWAYS FAIR WEATHER; ALLIED ARTISTS: FRIENDLY PERSUASION.

All of the bids or offers on the above pictures were in writing with the exception of those listed in answer to interrogatory 10. In the case of such oral bids or offers, the terms are as indicated in answer to interrogatory 10. In the case of written bids or offers, such written bids or offers have already been produced for inspection by defendants' counsel, and are available for further inspection by defendants' counsel, upon request. Photostatic copies will be made upon request, at defendants' expense.

* * *

4. The Viking Theatre Corporation made bids or offers on the following pictures, which it contends should have been accepted in preference to all other bids or offers, excluding the pictures which it was actually awarded: PARAMOUNT: THE BRIDGES OF TOKO-RI, THE COUNTRY GIRL, HELL'S ISLAND, THE BIRDS AND THE BEES, WAR AND PEACE,

THAT CERTAIN FEELING, THE MOUNTAIN, THE COURT JESTER (should have been awarded either to Viking or Arcadia); WARNER BROTHERS: HELEN OF TROY, SERENADE, THE BAD SEED, TOWARDS THE UNKNOWN, GIANT, THE MCCONNELL STORY (should have been awarded to either Viking or Arcadia), PETE KELLY'S BLUES (should have been awarded to either Viking or Arcadia), BLOOD ALLEY (should have been awarded to either Viking or Arcadia); COLUMBIA: THE CAINE MUTINY, SOLID GOLD CADILLAC, PICNIC; UNITED ARTISTS: THE BAREFOOT CONTESSA, SUMMERTIME, GENTLEMEN MARRY BRUNETTES, AMBASSADOR'S DAUGHTER; TWENTIETH CENTURY-FOX: THE LEFT HAND OF GOD, THE TALL MEN, CAROUSEL, BUS STOP, THE BEST THINGS IN LIFE ARE FREE, BETWEEN HEAVEN AND HELL; LOEW'S: GUYS AND DOLLS, TEA AND SYMPATHY, THESE WILDER YEARS, JULIE; UNIVERSAL: FOXFIRE, WRITTEN ON THE WIND; RKO: DEATH OF A SCOUNDREL, TENNESSEE'S PARTNER.

* * *

6. The answer to interrogatory 6 for the period January 1, 1954 to November 13, 1956 is set forth in Schedule "A" attached hereto. [Schedule "A" consists of a list of the pictures shown at the Viking during the period from July 2, 1954 to November 13, 1956. Similar information is found in Exhibit P-176.]

FOURTH PRE-TRIAL ORDER.

[Filed February 26, 1960]

* * *

3(b) Whether the Stanley-Warner, Goldman and Fox "Splits" were illegal per se.

It is understood that the allegation that the above splits were illegal per se is presently to be treated as abandoned and no longer an issue in the case.

* * *

In accordance with the foregoing discussion, and by way of summary and recapitulation of the foregoing rulings, it is hereby ORDERED and DECREED:

* * *

(b) That the allegation that the so-called Stanley-Warner, Goldman and Fox splits were illegal per se is no longer an issue in the case.

EXCERPTS FROM FIRST TRIAL OCTOBER 11, 1960.

(56) *

Philadelphia, Pa., October 11, 1960.

Before Hon. John W. Lord, Jr., *J.*, and a jury.

(83)

The Court: Mr. Rome, first of all, I want to say that I appreciate your frankness, and I believe in your sincerity.

Mr. Rome: Thank you, sir.

The Court: I certainly think there is a conflict of interest, for the reasons that you have indicated, and I have thought about it, too.

It would be a different matter maybe if Mr. Goldman and Mr. Sley said, it is all right, Mr. Kohn, but there are other defendants here involved. If he was the only defendant that would be one thing.

I will not repeat the reasons you have given, but I agree with you that there is a conflict of interest.

Yes, Mr. Kohn.

Mr. Kohn: Well, in view of what Mr. Rome has just said I am withdrawing from the Goldman-Shubert case as of now.

I will see Mr. Rome or whoever else represents that plaintiff and thereafter I will of course turn over every file and give the utmost cooperation in setting counsel off to what I hope will be a successful plaintiff's conclusion in that

* Figures in parentheses refer to page numbers of typewritten transcript.

case, and I say that whether or not I am permitted to remain in the Viking case.

In view of what has just been said I feel it
(84)
would be inappropriate for me to continue representing the plaintiff in the Goldman-Shubert case and I therefore withdraw from that case, and I trust you will communicate that to Goldlawr, Inc., and I will make whatever appropriate arrangements you want to turn over everything to you and get you started on that.

The Court: Well, I think, Mr. Kohn, you have no alternative there, where your client requested you withdraw.

Mr. Kohn: If he still wants me to stay on that I say I am out of that case, come what may in this case. In other words, whether I remain in the Viking case or not I am out as of now from the Goldman-Shubert case. I wouldn't and I couldn't continue in that case after what has just been stated.

Secondly, this matter, as I said before, has been known to all of the persons involved, and certainly to Mr. Rome, for many, many years, several years at least. I therefore think it is inappropriate for them to request at this time that I withdraw from this case.

If there was any such feeling that this situation was inconsistent or incompatible it should have been mentioned years ago. I would then have been happy to withdraw from the Goldman-Shubert case. They know that
(85)
our interest has always been in the motion picture business for many, many years. These cases came first and we would simply not have taken the Goldman-Shubert case, which the Goldlawr people urged us very vigorously to assume. So that from that point of view I think it is most unfair.

The distributor-defendants, I am frankly at a loss to understand what interest they have in this situation. They

suggest, for example, that we should dismiss Goldman Theatres, or it has been suggested. That I think would do the distributor-defendants no good. So at one and the same breath they say: You are going to lean over backwards to favor Goldman. And at the same time they say: Somehow or other you are taking advantage of Goldman.

I think it would be a cowardly thing for me to do, and certainly dishonorable, and unfair and disloyal to the Viking Theatre, for me even to entertain a suggestion that the Goldman Theatres be dismissed from this suit. Frankly I would rather get dismissed than have Goldman Theatres dismissed, because I am not going to prefer my own convenience to the client's, whether I or somebody else conducts this litigation. I feel that so long as I am in it Goldman Theatres should remain in it. It has been our opinion and we think the pretrial discovery shows

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that Goldman Theatres is an integral part of this situation.

As I said to Mr. Rome, the Viking Theatre I think was unfairly dealt with in violation of the antitrust laws in this situation a[illegible] I think that the Goldlawr Corporation was unfairly dealt with in violation of the antitrust laws in the other situation.

It is not uncommon that somebody who was entering an industry would be unfairly dealt with by the established parties to the situation.

I think the cases are clear on this, and before any final disposition is made of it I would like to answer the supplemental memorandum which we have just seen and I have not even read yet. I think the cases are clear that even in a situation where there is a real basis for disqualification, that is, where you are trying to represent two different parties in the same controversy, in the same industry, in the same situation, that you are not disqualified as to any other party. In other words, you are not a pariah, or taboo, in the situation forever.

If it is determined that there is some reason why I would have to get out of this case, and I frankly see none, I don't think that affects the other defendants. I still am groping for why they feel that this is unfair.
(87)
or in some way gives them a right.

I mean, suppose for example, that I were just friendly with Mr. Goldman, as many people are in a city the size of Philadelphia, with prominent parties, and industrialists, and businessmen, and lawyers, I mean how do you evaluate that sort of thing? The fact that I represented a corporation in which he was interested I do not think makes me any more or less friendly or unfriendly to him in so far as they are concerned.

They seem to feel somehow or other that I am going to be easy on him, apparently the feeling of the Goldman people is that I am going to be hard on him. I think there is a certain ambivalence there which I think is predicated upon the same thing, they would like to win this case and they would like to win it quickly, and they would like to get rid of me.

Having waited so long I do not think that they can with good grace come in and ask at this late date to kick me out of here.

I will eliminate in so far as it is possible any problem of conflict. Mr. Goldman and Goldlawr will be protected. I will be out of that case but I mean I will not hold back anything. I will give them the files and set them off with my blessing. I hope they win, as
(88)
I hope we win here.

The Court: Well, Mr. Kohn, whether I agree with you or not as to whether it was improper, I do think it does put you at least in an embarrassing position, and it may very well be that, when you cross-examine Mr. Goldman, the manner in which you do it in comparison with other defendants or officers of defendants. It is a very nice question.

As I understand, Mr. Kohn, you refuse to accept the recommendation of Mr. Goldman, made through his counsel, Mr. Rome, that you and your office withdraw from the trial of this case, the Viking case.

Mr. Kohn: For the reasons which I have given and in consideration of the time of the request.

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Mr. Fine: The so-called Schwalberg document that Mr. Nizer referred to today, if it refers to anything that I have gotten, could only refer to an undated, I think, 2-page memorandum which seems to record the Schwalberg agreement. I got that in the following way:

When the Arcadia retained Mr. Lowenthal to represent them he went into discovery proceedings on their behalf. In the course of that discovery Mr. Gray, with his office in the Schnader office, representing William

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Goldman Theatres in that case, gave to Donald Brown in Mr. Lowenthal's office a copy of an undated 2-page memorandum which contained references to this Schwalberg agreement.

I noticed a reference to that in some of Mr. Brown's papers and asked him to supply me with a copy, because I was surprised that it existed, since in the deposition that I had taken of Mr. Schwalberg with Mr. Goldman they both denied that there was any written record that the knew of of this agreement.

Mr. Brown supplied a copy of that to me, and I then asked Mr. Haviland and also Mr. Rome to produce the original from which this copy had been made, and I told Mr. Rome that it came from Mr. Gray's file. In fact, I wrote them a letter on that.

He said he would take the matter up with Mr. Gray, but he never produced the original for me. So we didn't get that from Mr. Goldman. Mr. Goldman denied having it,

Mr. Schwalberg denied having it. It only came to us by some chance because the Arcadia people got it from Mr. Gray. And in the same way we didn't get the memorandum that was submitted to Your Honor with Mr. Hugh Owens' deposition dated January 1956 relating to the Schwalberg agreement in our discovery proceeding until
(105)
we noticed that it had been listed as a document in the Arcadia pretrial memorandum by the Arcadia's counsel. They got it from the defendants. The defendants had withheld it from us. But once it was disclosed in the Arcadia memorandum then, of course, it was given to us.

* * *

(108)

The Court: That is a matter for your judgment.

I think the first matter that I have to decide is as to whether the Court will request Mr. Kohn to voluntarily withdraw, and, secondly, if he does not, whether the Court will direct him to withdraw, withdraw a juror, and continue the case.

There are many well known members of the bar involved in this case. It is a very unpleasant situation. There have been all sorts of implications made and I feel this, that I am going to submit the matter. I do not feel that I ought to act on it alone and I am going to submit the matter to the Board of Judges, giving them the entire problem and asking their advice: First, as to whether the Court should request Mr. Kohn to withdraw, and secondly, if he continues in his refusal, whether the Board of Judges feel that under the circumstances I should withdraw a juror, direct Mr. Kohn to withdraw, and
(109)
continue the case.

That would dispose of the present problem before me.

Third, I shall also consult with the judges as to whether any further proceedings might be undertaken in their good judgment on the basis of the record now before the Court.

That too is a matter that is very unpleasant. It presents a lot of implications and I would want the comfort of the advice of my fellow judges as to how they would vote if they had the problem.

Of course, when I can do that is a matter that I do not know, except that today is Tuesday and we have our regular meeting of the Board of Judges, a luncheon. I am going to present it to them at that time. So that I may have some answer as to the first problem immediately. I do not know.

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(111)

Mr. Kohn: We think that a new element was injected into this matter when we were told for the first time this morning, shortly before we adjourned, by Mr. Rome, whom I assume speaks with authority for William Goldman Theatres in this matter, that it was the wish of Mr. Goldman that we withdraw from the representation of the plaintiff in this matter.

It was our feeling until then that we could and indeed should with perfect propriety remain in this matter, because the only persons who had any interest in whether we did or did not continue the representation were

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the Viking and the William Goldman Theatre interests.

However, when that was stated this morning, while I still think that in view of the fact that William Goldman Theatres had known, acquiesced, consented, approved for four years of our representation of the plaintiff in this matter, that they had no legal right to request us to withdraw, in view of their request I would not further debate the matter, and thinking it over during lunch it was our decision unanimously and jointly that we withdraw from the case, that is, withdraw from this case.

As I announced this morning, I am withdrawing from the Goldlawr v. Shubert case and will not represent the

Goldman interest in that or any other matter, regardless of my withdrawal from this proceeding.

We have talked to Mr. Sley, and to his personal counsel, Mr. Straub, who was mentioned yesterday by Mr. Ward. They both feel under the circumstances the matter is for us for decision and they are entirely satisfied to have us withdraw from these proceedings at this time.

All they ask, and in good conscience I think they certainly are entitled to it, is that they be given an opportunity to acquire other counsel and not simply be left unrepresented on this record. We are therefore respect-
(113)
fully requesting of the Court simply to continue this matter until Thursday, Thursday morning at 10 o'clock, by which time we have every reason to believe other counsel will have come into the case, and other counsel can then carry on from there when we withdraw.

We think the Viking Theatre, in view of what we think is the change of position of William Goldman Theatres at this late date, is entitled to that consideration in carrying over a matter of this kind.

So that just to summarize we will withdraw our appearance here I suppose as of Thursday morning. Other counsel will then enter an appearance and make whatever arrangements are satisfactory to the Court and to other counsel to set the matter down for another trial date.

I am very unhappy about this, but I feel that under the circumstances, in view of what has been said this morning by Mr. Rome, that I would prefer to withdraw.

The Court: Judge Levinthal, do you have anything further to add?

Mr. Levinthal: Nothing other than this, that I told Mr. Kohn and Mr. Fine, when they informed me of the situation, that I felt very strongly that both morally and legally their position was perfectly sound.

They had a perfect right to represent Viking

(114)

in this case and the Goldman Theatres in the other matter, so long as both of their clients were aware of their representation and agreed to have the law firm represent both of those clients, but, in view of the fact that the Goldman Theatres asked our firm—as you know I am associated with the firm of Dilworth, Paxson, Kalish, Kohn and Dilks as chief counsel. In view of the fact as I have stated, that Goldman Theatres have asked our firm not to represent Viking, despite the fact that I feel technically Goldman Theatres have no right at this late date after the jury has been sworn to withdraw an agreement entered into four years ago, because for four years they had agreed to this representation, I still think from the ethical point of view and the moral point of view that our law firm ought not to sit in this case.

• • •

STIPULATION.

AND Now, this 8th day of May, 1961, by agreement of counsel, the figures on the attached sheets represent the national film rentals of the pictures distributed by the distributor defendants which were exhibited first-run Philadelphia during the period July 2, 1954 to November 13, 1956.

It is agreed by and among the parties that the information contained on the attached exhibits may be considered as accurate and authentic for purposes of the trial of this case, but that each party reserves the right to object to the relevancy of any or all of this information.

It is also agreed that the information contained in these exhibits is confidential, and plaintiff agrees that it will not reveal this information to anyone or use this information other than is necessary in the actual trial of this case.

DRINKER, BIDDLE & REATH,
1100 Phila. National Bank Bldg.,
Philadelphia 7, Pennsylvania.

s/ HENRY W. SAWYER, III,
Henry W. Sawyer, III
Attorney for Plaintiff.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania.

s/ W. BRADLEY WARD,
W. Bradley Ward

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor, Packard Bldg.,
Philadelphia 2, Pennsylvania.

s/ LOUIS J. GOFFMAN,
Louis J. Goffman

BLANK, RUDENKO, KLAUS & ROME,
1660 Suburban Station Bldg.,
Philadelphia 3, Pennsylvania.

s/ EDWIN P. ROME,
Edwin P. Rome

MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pennsylvania.

s/ JOHN N. SCHAEFFER, JR.,
John N. Schaeffer, Jr.

PARAMOUNT

Title	*National Film Rentals (Millions)*
LIVING IT UP	3.954
ABOUT MRS. LESLIE	1.035
REAR WINDOW	4.589
SABRINA	3.373
REAP THE WILD WIND (RE-REL)	.908
THREE RING CIRCUS	3.334
BRIDGES AT TOKO-RI	4.309
MAMBO	.455
CONQUEST OF SPACE	.874
ULYSSES	1.575
THE COUNTRY GIRL	6.046
RUN FOR COVER	1.161
HELL'S ISLAND	.687
FAR HORIZONS	1.186
SEVEN LITTLE FOYS	3.746
WE'RE NO ANGELS	2.503
NEVER TOO YOUNG	2.866
STRATEGIC AIR COMMAND	5.563
WHITE CHRISTMAS	7.929
THE GIRL RUSH	.689
TO CATCH A THIEF	3.773
LUCY GALLANT	1.036
TROUBLE WITH HARRY	.879
THE DESPERATE HOURS	1.510
ARTISTS AND MODELS	3.262
ROSE TATOO	3.548
COURT JESTER	1.619
ANYTHING GOES	1.625
SCARLET HOUR	.331
BIRDS AND BEES	1.320

PARAMOUNT (Continued)

Title	*National Film Rentals (Millions)*
MAN WHO KNEW TOO MUCH	3.224
THE LEATHER SAINT	.471
THAT CERTAIN FEELING	1.747
PARDNERS	2.885
PROUD & PROFANE	2.992
VAGABOND KING	.410
SEARCH FOR BRIDEY MURPHY	.263
THE MOUNTAIN	1.113
WAR AND PEACE	4.371

LOEW'S

STUDENT PRINCE	2.500
7 BRIDES FOR 7 BROTHERS	5.500
VALLEY OF KINGS	1.600
BETRAYED	1.992
HER TWELVE MEN	.800
GONE WITH THE WIND (RE-REL)	6.250
BEAU BRUMMELL	1.059
ROGUE COP	1.440
BRIGADOON	2.004
ATHENA BODY BEAUTIFUL	1.229

LAST TIME I SAW PARIS	2.665
CREST OF THE WAVE	.354
DEEP IN MY HEART	2.491
BAD DAY AT BLACK ROCK	2.010
MANY RIVERS TO CROSS	2.159
JUPITER'S DARLING	1.502
HIT THE DECK	2.016
BLACKBOARD JUNGLE	5.035
GLASS SLIPPER	1.381
BEDEVILLED	.537

LOEWS (Continued)

Title	*National Film Rentals (Millions)*
CAMILLE (RE-REL)	.300
PRODIGAL	2.181
MARAUDERS	.573
LOVE ME OR LEAVE ME	4.070
MOONFLEET	.578
INTERRUPTED MELODY	1.827
THE WIZARD OF OZ (RE-REL)	.448
THE COBWEB	1.398
THE KING'S THIEF	.490
THE SCARLET COAT	.458
IT'S ALWAYS FAIR WEATHER	1.395
TRIAL	2.334
THE PHILADELPHIA STORY (RE-REL)	—
QUENTIN DURWARD	.672
THE TENDER TRAP	3.110
KISMET	1.225
GUYS AND DOLLS	6.850
I'LL CRY TOMORROW	5.922
DIANE	.472
RANSOM	1.242
FOREVER DARLING	1.945
THE LAST HUNT	1.634
MEET ME IN LAS VEGAS	2.239
FORBIDDEN PLANET	1.563
TRIBUTE TO A BAD MAN	1.211
GABY	.659
BHOWANI JUNCTION	2.075
CATERED AFFAIR	.943
FASTEST GUN ALIVE	2.300
SOMEBODY LIKES ME	1.941

LOEWS (Continued)

Title	*National Film Rentals (Millions)*
WILDER YEARS	.584
HIGH SOCIETY	5.668
THE SWAN	1.767
THE RACK	.359
LUST FOR LIFE	1.586
TEA AND SYMPATHY	2.139
THE POWER AND THE PRIZE	.568
THE OPPOSITE SEX	1.729
BATTLE GROUND (RE-REL)	.345
ASPHALT JUNGLE (RE-REL)	.244
EXECUTIVE SUITE	2.680

TWENTIETH CENTURY-FOX

DEMETRIUS AND GLADIATOR	3.780
GARDEN OF EVIL	3.165
GAMBLER FROM NATCHEZ	.951
BROKEN LANCE	3.593
THE EGYPTIAN	3.867
WOMAN'S WORLD	2.555
CARMEN JONES	2.256
BLACK WIDOW	1.866
HAJJI BABA	1.278
DESIREE	2.347
NO BUSINESS LIKE SHOW BUSINESS	4.135
PRINCE OF PLAYERS	.389
WHITE FEATHER	1.600
THAT LADY	.398
THE RACERS	1.590
LIFE IN THE BALANCE	.260
UNTAMED	2.155
MAN CALLED PETER	4.366
VIOLENT SATURDAY	1.266
ANGELA	.215

TWENTIETH CENTURY-FOX (Continued)

Title	*National Film Rentals (Millions)*
LIVING SWAMP	.121
MAGNIFICENT MATADOR	.941
SOLDIER OF FORTUNE	2.606
DADDY LONGLEGS	2.407
HOUSE OF BAMBOO	1.622
7 YEAR ITCH	4.879
HOW TO BE POPULAR	1.631
VIRGIN QUEEN	.640
LEFT HAND OF GOD	2.414
LOVE SPLENDORED THING	2.943
7 CITIES OF GOLD	.888
THE TALL MEN	3.617
GIRL IN VELVET SWING	1.177
POMPEY'S HEAD	1.291
THE DEEP BLUE SEA	.354
GOOD MORNING MISS DOVE	1.301
THE RAINS OF RANCHIPUR	2.194
LIEUTENANT WORE SKIRTS	1.969
BOTTOM OF THE BOTTLE	1.023
THE MAN WHO NEVER WAS	.997
CAROUSEL	2.804
THRESHOLD OF SPACE	.928
MAN IN GREY FLANNEL SUIT	3.601
23 PACES TO BAKER STREET	.747
REVOLT OF MAMIE STOVER	1.751
MOHAWK	.673
THE PROUD ONES	1.296
HILDA CRANE	.604
D-DAY SIXTH OF JUNE	1.656
ABDULLAH'S HAREM	.189

TWENTIETH CENTURY-FOX (Continued)

Title	*National Film Rentals (Millions)*
KING & I	6.534
QUEEN OF BABYLON	.208
BUS STOP	3.288
LAST WAGON	1.356
BIGGER THAN LIFE	.491
TEENAGE REBEL	1.324
BEST THINGS IN LIFE ARE FREE	1.434

WARNER BROS.

HIGH AND THE MIGHTY	5.366
RING OF FEAR	1.411
KING RICHARD & CRUSADERS	1.302
DUEL IN JUNGLE	1.241
DRAGNET	4.276
BOUNTY HUNTER	1.065
STAR IS BORN	4.340
DRUM BEAT	2.317
TRACK OF THE CAT	1.443
SILVER CHALICE	2.115

YOUNG AT HEART	1.888
JUMP INTO HELL	.388
BATTLE CRY	7.336
UNCHAINED	.462
NEW YORK CONFIDENTIAL	.889
EAST OF EDEN	3.230
STRANGE LADY IN TOWN	1.225
THE SEA CHASE	2.197
TALL MAN RIDING	.965
MISTER ROBERTS	7.653

WARNER BROS. (Continued)

Title	*National Film Rentals (Millions)*
LAND OF PHARAOHS	1.813
THE DAM BUSTERS	.364
PETE KELLY'S BLUES	2.787
THE McCONNELL STORY	2.223
BLOOD ALLEY	1.830
ILLEGAL	.478
REBEL WITHOUT A CAUSE	3.675
I DIED A THOUSAND TIMES	.747
SINCERELY YOURS	.692
COURT MARTIAL OF BILLY MITCHELL	2.969
TARGET ZERO	.484
HELL ON FRISCO BAY	1.909
HELEN OF TROY	2.512
LONE RANGER	1.394
MIRACLE IN THE RAIN	1.060
OUR MISS BROOKS	.313
SERENADE	1.053
GOODBYE MY LADY	.461
THE SEARCHERS	4.169
ANIMAL WORLD	.614
MOBY DICK	4.505
SANTIAGO	1.392
SATELLITE IN SKY	.523
SEVEN MEN FROM NOW	.526
MR. ROBERTS (RE-ISSUE)	7.653
REBEL WITHOUT CAUSE (RE-ISSUE)	3.675
BURNING HILLS	1.325
CRY IN THE NIGHT	.454
THE BAD SEED	2.822
TOWARD UNKNOWN	1.693

RKO

Title	*National Film Rentals (Millions)*
LIBERTY ROAR	
KILLERS OF SPACE	.214
SILVER LODE	.708
SUSAN SLEPT HERE	2.262
AFRICAN ADVENTURE	.205
PASSION	.614
THIS IS MY LOVE	.355
CATTLE QUEEN	.943
UNDERWATER	2.108
TARZAN'S JUNGLE	.437
HANSEL & GRETEL	.542
AMERICANO	1.127
RAGE AT DAWN	.795
ESCAPE TO BURMA	.747
PEARL OF SOUTH PACIFIC	.628
BENGAZI	.348
HANS CHRISTIAN ANDERSEN (RE-ISSUE)	4.411
TREASURE OF PANCHO VILLA	.903
TENNESSEE'S PARTNER	.731
TEXAS LADY	.640
SLIGHTLY SCARLET	.536
THE CONQUEROR	3.669
BOLD & BRAVE	.887
GREAT DAY IN MORNING	.556
WHILE THE CITY SLEEPS	.635
MUSIC LAND	.124
CITIZEN KANE (RE-ISSUE)	
BEYOND REASONABLE DOUBT	.373
BACK FROM ETERNITY	.824

UNITED ARTISTS

Title	*National Film Rentals (Millions)*
ASSASSIN	.077
MOON IS BLUE (RE-REL)	
CROSSED SWORDS	.330
JOHN SMITH AND POCAHONTAS	.250
OLIVER TWIST (RE-REL)	
PERSONAL AFFAIR	.166
HEIDI	.575
WHITE MANE	.011
YELLOW TOMAHAWK	.625
SOUTHWEST PASSAGE	.634
LONE GUN	.539
RETURN TO TREASURE ISLAND	.348
GOG	.274
HOBSON'S CHOICE	.228
MAN WITH A MILLION	.963
APACHE	3.102
VICTORY AT SEA	.059
DOWN THREE DARK STREETS	.707
SITTING BULL	1.591
GOLDEN MISTRESS	.368
SHIELD FOR MURDER	.433
LITTLE KIDNAPPERS	.389
BAREFOOT CONTESSA	2.747
WHITE ORCHID	.250
TWIST OF FATE	.236
VERA CRUZ	4.311
ROMEO & JULIET	.294
BLACK TUESDAY	.579
BATTLE TAXI	.419
PURPLE PLAIN	1.119

UNITED ARTISTS (Continued)

Title	*National Film Rentals (Millions)*
CANYON CROSSROADS	.289
BIG HOUSE, U. S. A.	.457
STRANGER ON HORSEBACK	.696
MARTY	2.896
A BULLET FOR JOEY	.373
KISS ME DEADLY	.721
ROBBER'S ROOST	.484
TOP OF THE WORLD	.313
NOT AS A STRANGER	6.121
SUMMERTIME	1.412
KENTUCKIAN	2.612
NAKED STREET	.396
NIGHT OF THE HUNTER	.858
DESERT SANDS	.481
GENTLEMEN MARRY BRUNETTES	1.164
BIG KNIFE	.562
FORT YUMA	.397
MAN WITH THE GUN	1.473
TOP GUN	.443
INDIAN FIGHTER	2.167
HEIDI & PETER	.165
MAN WITH GOLDEN ARM	4.023
THREE BAD SISTERS	.288
STORM FEAR	.253
KILLER LOOSE	.388
COMANCHE	1.032
BROKEN STAR	.269
BLACK SLEEP	.437
REBEL IN TOWN	.435
CREEPING UNKNOWN	.229

UNITED ARTISTS (Continued)

Title	*National Film Rentals (Millions)*
ALEXANDER THE GREAT	1.968
KISS BEFORE DYING	.574
STAR OF INDIA	.168
THE KILLING	.333
FOREIGN INTRIGUE	.782
NIGHTMARE	.202
HIGH NOON (RE-ISSUE)	
TRAPEZE	6.974
JOHNNY CONCHO	1.494
AMBASSADOR'S DAUGHTER	.951
RUN FOR SUN	1.002
BANDIDO	1.193
ATTACK	1.478

UNIVERSAL

BLACK HORSE CANYON	.823
FRANCIS JOINS WACS	1.773
MAGNIFICIENT OBSESSION	4.764
BLACK SHIELD	1.544
DAWN AT SOCORRO	.809
NAKED ALIBI	.598
GENEVIEVE	
HIGH & DRY	
TIGHT LITTLE ISLAND (RE-ISSUE)	
LAVENDER HILL MOB (RE-ISSUE)	

UNIVERSAL (Continued)

Title	*National Film Rentals (Millions)*
BENGAL BRIGADE	.962
4 GUNS TO BORDER	.784
WEST OF ZANZIBAR	
SIGN OF THE PAGAN	2.066
SO THIS IS PARIS	1.148
DESTRY	1.193
LAND OF FURY	
YELLOW MOUNTAIN	.635
FAR COUNTRY	2.190
SIX BRIDGES TO CROSS	1.539
CAPTAIN LIGHTFOOT	1.027
SMOKE SIGNAL	.772
CHIEF CRAZY HORSE	1.522
MAN WITHOUT A STAR	1.970
REVENGE OF THE CREATURE	.837
CULT OF THE COBRA	.376
THE LOOTERS	.462
THE MAN FROM BITTER RIDGE	.589
THIS ISLAND EARTH	1.346
FOXFIRE	1.618
AIN'T MISBEHAVIN'	.725
PURPLE MASK	.723
ONE DESIRE	.779
PRIVATE WAR MAJOR BENSON	1.639
THE SHRIKE	1.072
FEMALE ON BEACH	1.313
NAKED DAWN	.378
KISS OF FIRE	.460
TO HELL AND BACK	5.171
CRUEL SEA (RE-ISSUE)	

UNIVERSAL (Continued)

Title	*National Film Rentals (Millions)*
MAN IN WHITE SUIT (RE-ISSUE)	
BROWNING VERSION (RE-ISSUE)	
PROMOTER (RE-ISSUE)	
LADY GODIVA	.489
HOLD BACK TOMORROW	.168
RUNNING WILD	.567
TARANTULA	.915
THE SECOND GREATEST SEX	1.048
THE SPOILERS	1.066
THE SQUARE JUNGLE	.714
ALL THAT HEAVEN ALLOWS	2.605
THERE'S ALWAYS TOMORROW	.660
THE BENNY GOODMAN STORY	2.188
WORLD IN MY CORNER	.623
NEVER SAY GOODBYE	1.319
BACKLASH	1.211
THE CREATURE WALKS AMONG US	.613
STAR IN THE DUST	.545
RAWHIDE YEARS	.908
CONGO CROSSING	.522
TOY TIGER	1.157
FRANCIS HAUNTED HOUSE	.887
AWAY ALL BOATS	2.919
WALK PROUD LAND	1.244
RAW EDGE	.585
PILLARS OF SKY	1.130
EDGE OF HELL	.103
UNGUARDED MOMENT	1.152
MOLE PEOPLE	.418
BEAST OF AMAZON	.471
THE KILLERS (RE-REL)	
SLEEPING CITY (RE-REL)	
TENSION AT TABLE ROCK	.694

COLUMBIA

Title	*National Film Rentals (Millions)*
THE IRON GLOVE	.271
BAIT	.249
CAINE MUTINY	7.302
ON THE WATERFRONT	5.504
PUSHOVER	.678
OUTLAW STALLION	.409
PIRATES TRIPOLI	.284
HUMAN DESIRE	.629
LAW VS. BILLY KID	.479
BULLET IS WAITING	.688
PHFFFT	1.345
FIRE OVER AFRICA	.551
THEY RODE WEST	.551
THE BLACK KNIGHT	1.136
THREE HOURS TO KILL	.725
THE BLACK DAKOTAS	.480
THE END OF THE AFFAIR	.438
TEN WANTED MEN	.947
WOMAN'S PRISON	.620
WYOMING RENEGADES	.411
TIGHT SPOT	.593
MASTERSON OF KANSAS	.568
NEW ORLEANS UNCENSORED	.315
THE BAMBOO PRISON	.359
IT CAME FROM BENEATH THE SEA	1.064
THE DETECTIVE	.489
THE VIOLENT MEN	1.853
THE LONG GRAY LINE	3.240
THREE FOR THE SHOW	.976
A PRIZE OF GOLD	.705

COLUMBIA (Continued)

Title	*National Film Rentals (Millions)*
CELL 2455, DEATH ROW	.510
5 AGAINST THE HOUSE	.495
SEMINOLE UPRISING	.442
CREATURE WITH ATOM BRAIN	.394
CHICAGO SYNDICATE	.360
THE MAN FROM LARAMIE	3.044
FOOTSTEPS IN THE FOG	.436
BRING A SMILE ALONG	.378
APACHE AMBUSH	.299
SPECIAL DELIVERY	.254
NIGHT HOLDS TERROR	.449
DUEL ON THE MISSISSIPPI	.373
THE GUN THAT WON THE WEST	.449
MY SISTER EILEEN	1.473
COUNT 3 AND PRAY	1.025
THE LAST FRONTIER	1.054
COCKLESHELL HEROES	.588
LAWLESS STREET	.868
QUEEN BEE	.655
3 STRIPES IN THE SUN	.781
JOE MacBETH	.180
TEEN-AGE CRIME WAVE	.354
PICNIC	6.132
HARDER THEY FALL	1.195
BATTLE STATIONS	.580
STORM OVER THE NILE	.277
1984	.202
JUBAL	1.712
HOT BLOOD	.713
ROCK AROUND THE CLOCK	1.061

COLUMBIA (Continued)

Title	*National Film Rentals (Millions)*
SAFARI	1.298
EDDY DUCHIN STORY	4.694
EARTH VS. FLYING SAUCERS	1.052
WEREWOLF	.376
AUTUMN LEAVES	.883
MIAMI EXPOSE	.291
STORM CENTER	.185
SOLID GOLD CADILLAC	2.305
PORT AFRIQUE	.373
CHA-CHA-CHA BOOM	.207

EXCERPTS FROM PRE-TRIAL CONFERENCE MAY 10, 1961.

(1) *

Philadelphia, Pa., May 10, 1961

Before Hon. John W. Lord, Jr., *J.*

* * *

(28)

Mr. Sawyer: The first point I want to make, Your Honor, is that I think this does come late and it does come on the eve of trial and without justification, because the letter that was sent to opposing counsel at the outset of this previous case, which was dated September 30th, contained the identical order of witnesses, without any change at all, because I was at pains not to change it, assuming that that was all water over the dam, as my subsequent letter was merely confirmatory.

That means they have had since September 30th to propose to this Court a change in my order of proof, and I think this is hardly timely.

I have no reservations in my mind that the portions of their brief that seek to convince Your Honor that this is within Your Honor's discretion are quite correct. I have no doubt whatsoever it is in Your Honor's discretion. I suggest that it is a discretion which the Court seldom exercises, that the traditional rule that the plaintiff is, after all, to be allowed discretion in the way he puts on

(29)

his case is the basic one, but that in antitrust cases on some occasions the Courts have, and rarely, decided that they would dictate to the plaintiff the order in which he puts it on.

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* Figures in parentheses refer to page numbers of typewritten transcript.

I do not think it is usually done and I think it would be some inconvenience to me. I do not think it has any great impact on the case. It would be some inconvenience to me, but I would say this to Your Honor that if Your Honor decides that you believe that this would facilitate the trial—I mean I would not want it, I would rather stay where we are, but I think it is entirely within Your Honor's discretion; however, I would say this, that if I am to put these people on the stand at the outset I would ask to not have the case commence until Wednesday, and there is a particular reason for that. I have prepared both witnesses to a large extent, but there are matters, particularly some statistical analyses, which we have just about completed, which I had not prepared them on, and I thought, of course, there would be ample time. We have weekends and everything else before they would go on and I could finish that up, and I wouldn't want extra time.

However, I do think that at this point, this is a late date for the defendants to suggest, more than six months after they have had notice, that there is something
(30)
inherently wrong or unfair to them, or that it will expedite the trial to change around an order of proof two or three days after the case starts. I fail to see why this should not have been brought up long before I was in the case.

Mr. Ward: May I explain why, sir, by way of brief rebuttal?

The Court: Yes.

Mr. Ward: I think that we as counsel would be the first to be criticized if we should have relied on the order of witnesses listed by previous counsel.

I had hoped that when there was new counsel perhaps the order would be arranged in a manner which would be more in keeping with the principles that I have outlined earlier in my presentation.

We have not had six months' notice of the order of the plaintiff's witnesses at this trial, we have had five days. So therefore it is not accurate to say that we have sat idly by and done nothing, when Mr. Sawyer himself had six months to notify us of the order if he chose to, but he complied with Your Honor's order and gave us a week's notice and therefore, for all we knew, when the list came through from him, it may well have been that Mr. Sley and Mr. Wren would have led the list.

So I do not think we can be scolded for not

(31)

having tried to get an order from Your Honor until he had expressed his own preference as to the order of witnesses. When he made that preference and made that choice we filed the memorandum with you, sir.

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(36)

Mr. Sawyer:

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(42)

Now, I say all that, Your Honor, only to point out that we must not confuse I think the order of proof question, on which I think Your Honor should be governed and should decide only if you feel that it is actually necessary to the proper administration of this case, with the question of whether or not we in any way have some obligation under trial practice or under the antitrust laws or the substantive law of any of these cases to somehow, in a mysterious fashion, prove our entire case, when the whole essence of the case is that a conspiracy operates quietly, the conspiracy operates not apparently as to the person who is being injured by it.

So if the hope is that at the end of the testimony, if they went on first, they would be able to move Your Honor to non-suit us, to terminate the case then and there because we had not yet proved the conspiracy in full, then, of

course, this I could not agree with in any sense, because I do not claim that we will prove it in full. How could we? If we could prove it in full between these two witnesses we would not need the rest of them.

(43)

That is the only thing I want to say and with that I think Your Honor should not change it around, but I think that it is something that Your Honor has discretion over.

* * *

(51)

The Court: And I agree with both of you, as a matter of fact, that certainly Mr. Sawyer can prove his case by other witnesses.

As I indicated, I was rather impressed by what Mr. Nizer said about connecting up. Of course, the plaintiff cannot prove his case by one witness naturally, particularly when there are so many exhibits.

You do not desire to file a brief, because you have recognized the fact that it is discretionary?

Mr. Sawyer: You have discretion, yes, sir. It is not a legal question.

The Court: I think what I will do is this,

(52)

and I have been thinking about it: I will defer a decision in the matter for the first week of the trial.

If after the first week I find that I am in agreement with the arguments advanced by Mr. Ward and Mr. Nizer I may direct you then to call Mr. Sley and Mr. Wren.

In other words, I feel that the first week of the trial will give me enough experience and feeling in the case so that there can be a clear understanding by the Court and the jury as to what is proposed to be proved here.

It may very well be that I will direct you to introduce Mr. Sley and Mr. Wren. So that having that in mind I would want you to be prepared to call Mr. Sley or Mr. Wren if I am of that opinion, I would say, by Tuesday a

week. That, Mr. Sawyer, will give you two full weekends and of course today is only Wednesday.

Mr. Sawyer: Your Honor, may I suggest that if you decide to do that and I feel that I have had my time for the weekends full getting ready for these people that are going to be on, that Your Honor would not at this time preclude giving me a day's recess in between.

The Court: I may very well do that.

Mr. Sawyer: Some of this statistical material I think is quite important, and it does require some additional preparation, which I have not yet done.
(53)

The Court: There is no doubt about that, but, of course, I feel that you should be and I am certain that you are prepared to go ahead to prove your case on Monday.

Mr. Sawyer: I am prepared with what I have.

The Court: Naturally you would be entitled to think that you would call Mr. Sley and Mr. Wren last, and so therefore, you would not have the same urgency there.

Mr. Sawyer: Not quite, no, sir.

The Court: However, you have been given this notice that it could be by next Tuesday, and I think it is safe to say that if you request it I will give you a day.

Mr. Sawyer: Thank you, sir.

EXCERPTS FROM TESTIMONY.

(43)

The Court:

The third problem was the so-called Goldman-Stanley Warner split. As to that, I rule that the split between Goldman and Stanley Warner is lawful, and that it is admissible in evidence and may be referred to in plaintiff's opening. In other words, I rule that the split is lawful, but it can be proved that it was used in an unlawful manner. I am using the principles of a conspiracy in that statement. However, if counsel for the defendants feel that nothing else has been established, as I read the Brown case, in due course they may make a proper motion before me.

In other words, I have ruled that it is competent, that it is lawful, that Mr. Sawyer may mention it, but it is necessary that he show other things in the

(44)

case to show that a lawful object was used in an unlawful manner, to prove the conspiracy.

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(72)

Mr. Sawyer:

* * * *

(76)

The gist of the case is that these defendant-exhibitors, with the buying power that they represent, were able to get the distributor-defendants to go along with an arrangement and an agreement which did in fact, and was intended to harm my client in the conduct of his business. In what way? By keeping him from getting, keeping it, the Viking, from getting quality film, good films, at reasonable prices.

This is the simple basis of the conspiracy that we did not get quality film at reasonable prices. There

(77)

are many, many ramifications to this but this is the simple proposition. In fact, it is a simple question of fairness. Were we treated fairly or were we not?

• • •

(105)

Now, so much for the specifics of our case. We will be here a long time and we will attempt to convince you that this came about and that these things happened to the Viking through and because of these agreements among and between the defendants. You may decide we have proven an agreement between some of the defendants and not all. If you decide for us, you then will have to reach the question of how much we were damaged thereby and how much we are entitled to recover. If you come to the belief that we were

(106)

treated fairly, then we don't deserve any verdict at your hands and we don't desire it. If you come, on the other hand, to the belief that we did not get a fair shake; that anybody is entitled to that whether he is a big businessman or a little businessman going into any business, then we believe we are entitled to it. These antitrust laws are not complicated. They come down to the matter of business fairness; that any individual defendant can be as mean to us as he wants to be, and that is something that is all right. But if it is all done as part of a general agreement, as I say, this theatre should have been taken off the market, they want it off the market, and they are going to put it off the market, then as the judge will tell you, that is illegal and we are entitled to have our verdict.

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(270)

THIRD DAY.

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(272)

PLAINTIFF'S EVIDENCE.

(299)

SIMON FABIAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Sawyer:

Q. Mr. Fabian, will you give us your position and connection with, if any, of the defendant Stanley Warner Management Corporation?

A. I am the President.

Q. And you have a connection with the Stanley Company of America, sir?

A. President.

Q. President of Stanley Company of America. Where are your offices, Mr. Fabian?

(300)

A. 1585 Broadway, New York.

Q. Was there a time, Mr. Fabian, when your company was the owner of the Aldine Theatre in Philadelphia at 19th and Chestnut Streets?

A. There was.

Q. Were you familiar with that theatre and the motion pictures that had played in the past?

A. I was.

Q. How long had you been connected with the Stanley Company or the Stanley Warner Corporation?

A. Since March, 1953, although I had had a previous connection back in the 1920's.

Q. Were instructions given—strike that.

Did the time come when you or your company decided to dispose of the Aldine Theatre?

A. Yes.

Q. And when was that decision made, sir?

A. In the spring of 1953.

Q. Were there any instructions given by anyone in your company that the Aldine was not to be sold as a theatre?

A. Yes. We had determined that we had too many theatres——

Q. Just the answer, if you please. Just yes.

In whose hands, for the purpose of the sale, was the property placed?

(301)

A. Mr. Benjamin Wirth.

Q. And who is Mr. Benjamin Wirth?

A. At that time he was the head of our Real Estate Department.

Q. And was his office also in New York?

A. Yes.

Q. And was any broker or real estate agent used to dispose of this property?

A. I think he approached several brokers, finally it was sold by the Albert Greenfield Company.

Q. And were instructions given to the Albert Greenfield Company that in no event was this property to be sold to anyone who would use it as a motion picture theatre?

A. We had determined that we would not dispose of the property if it was sold as a theatre.

Mr. Sawyer: Your Honor, would you instruct Mr. Fabian that he must answer my question first and then if it is one which needs explanation, he may explain it.

The Court: Yes, that's right, Mr. Fabian. You answer the question, if you can, yes or no, and then qualify it in any way, explain it in any way.

The Witness: Certainly, Your Honor.

The Court: Very good.

Mr. Sawyer: Now, would the stenographer repeat the question.

(302)

(The reporter read the record as follows:)

"And were instructions given to the Albert Greenfield Company that in no event was this property to be sold to anyone who would use it as a motion picture theatre?"

By Mr. Sawyer:

Q. Will you answer that, Mr. Fabian, and then you may proceed, as I know you are anxious to do, to tell me why you gave those instructions, if you did.

A. The answer was the instructions were so given.

Q. Now, do you wish to say why you gave them?

A. Yes.

Q. I won't stop you. Go ahead.

A. There was at that time, and there was right up until the present day, a great scarcity of pictures in Philadelphia, as there is in the whole industry throughout the United States. Since 1948, progressively, the picture companies have made many less pictures than they previously had made, and this was intensified with the advent of television, and we determined that we just had too many theatres under our management in Philadelphia and that we could not get enough pictures to supply them all, and that we would dispose of several theatres, at least starting with one. And we had determined in this disposition that it might take the form of converting

(303)

the theatre ourselves to other purposes or razing the theatre, destroying it, as we did with the Mastbaum, or selling it for commercial purposes but, in any event, to take it out of the theatrical market competing for motion pictures.

* * *

Q. Mr. Fabian, is this condition that you describe as a shortage of product and too many theatres seeking it, did that condition continue right up to the present, I believe you said?

A. Yes. I think it has been intensified. There has been a further reduction in the number of pictures.

Q. In that event, how is it that you made the decision to put the Palace Theatre on first-run not so long ago if there were too many first-run theatres?

* * *

(305)

The Witness: As far as I know the Palace is not on the regular first-run policy, and whatever first-run picture went in there may have been just because at one particular period there may have been a sufficient amount of pictures to go around or maybe more than necessary.

The Court: Where is the Palace Theatre, Mr. Fabian?

The Witness: On Market Street.

The Court: Market around 12th or 13th?

The Witness: Around there, yes, sir.

By Mr. Sawyer:

Q. And you own that, that is one of your theatres, isn't it, Mr. Fabian?

A. Yes, it is.

Q. And isn't it true, Mr. Fabian, that the Palace Theatre

(306)

was on first-run for 18 months within the last couple of years?

A. I couldn't say. That would be up to the zone manager who has charge of our operations here.

Q. Isn't it true that you own the Lane Theatre?

A. We do.

Q. And that is not a downtown theatre at all, is it, Mr. Fabian?

A. No, it is not.

Q. And isn't it true that that has been playing first-run recently?

A. On an art policy.

* * *

By Mr. Sawyer:

Q. It has played regular first-run films, has it not, Mr. Fabian, in the last year?

A. Well, I stated it has played what we term in the industry art pictures.

Q. Have they been played there first-run?

A. Yes.

(307)

The Court: What is an art picture?

The Witness: An art picture, Your Honor, is something that has a limited audience appeal, in that some of these European pictures are pictures that don't attract the general mass appeal that we think we need for the larger theatres.

* * *

(317)

By Mr. Sawyer:

Q. Well, isn't it true, Mr. Fabian, that you were anxious—coming back to the Aldine now, you were anxious to eliminate the potential competition that the Aldine might afford if that property were to be bought and operated as a motion picture theatre?

A. We were interested to eliminate it as a theatre, yes.

Q. And would it have been Mr. Wirth of your Real Estate Department who would have given such instructions to the Greenfield office?

A. It would.

Q. How do you spell that, please?

A. W-o-r-t-h.

* * *

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By The Court:

Q. Mr. Fabian, as I understand it, you are the president of the Stanley Warner Management Corporation?

A. Yes, sir.

Q. And you owned the Aldine and you had decided to sell it for the reasons that you have indicated?

A. Yes, sir.

Q. And as president you turned it over to Mr. Wirth?

A. That's correct.

Q. That is, for the purpose of doing that?

A. Disposing of it.

Q. Now what was Mr. Wirth's capacity with your company?

A. Mr. Wirth was the head of what we call our Real Estate Department, which has charge of the management of our real estate as such, not as theatres.

Q. In other words, he was in charge of your real estate?

A. The property. He would make leases for the individual stores and so on.

Q. Make leases, if you were buying any or if you were selling any, he was your real estate expert?

A. That is correct.

Q. Is that correct?

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A. That is all he had; he had no voice in policy-making or operating the theatres.

Q. Did you have any discussion with Mr. Wirth as to any agreement that he made with respect to the sale of the Aldine Theatre?

A. Yes. He told me that he had definitely made an arrangement with the Greenfield office that it was not to be used as a theatre.

Q. As a theatre?

A. That is correct.

Q. Now did you have any conversation with him as to any agreement with anybody else as to whom the theatre might be sold to or whom it might not be sold to?

A. Never. Never, other than the main thing being that we owned the theatre and could have converted it ourselves or sell it and have somebody else convert it, because we always had in mind that it would not be a theatre.

The Court: Very well.

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By The Court:

Q. Now let me ask you again, Mr. Fabian. As I understand it, you had conversations with Mr. Wirth and he told

you about the fact that he had put it in the hands of other real
(328)
estate people, but that eventually Greenfield got it and that Greenfield was instructed not to sell it to anybody who would use it as a theatre?

A. Yes, and I confirmed the fact with Mr. Albert Greenfield myself.

Q. Very good.

Now, I repeat, did you have any agreement or rather did you have any conversation with Mr. Wirth as to any agreement that he had with anybody else as to the sale of that theatre?

A. No, certainly—I don't understand the question, Your Honor.

Q. All right.

A. He may have talked to some other broker.

Q. I am not referring to a broker.

A. Certainly he discussed it with nobody else other than a broker.

Q. I am not asking about discussions; I am asking about agreements.

Did you have any conversation where Wirth said, "I agreed with somebody"?

A. Definitely not.

Q. Very well.

A. Definitely not.

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(The following took place at side bar, not within the hearing of the jury:)

The Court: As I understand it, Mr. Sawyer, you propose to ask the witness on cross-examination whether he ever had an agreement with Mr. Goldman?

Mr. Sawyer: Yes.

The Court: He has said and repeated he didn't have any agreement with anybody else.

Mr. Sawyer: Because I want to impeach him, because I want to impeach him subsequently with Cincotta's testimony.

Mr. Wolf: That doesn't prove that he had any agreement.

The Court: You can. You can impeach him right now.

Mr. Sawyer: O.K. Then I won't ask him.

The Court: If you get Cincotta here, except to the extent that it doesn't impeach Fabian, after all, he said he never had any conversations with Wirth.

Now then, so far as Wirth and Goldman are concerned, that is a different matter. That is a different matter.

So far as Mr. Wirth being dead, I have asked

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you to give me some cases on the point, but my own independent research indicates that the Dead Man's Rule does not apply.

Mr. Wolf: We don't claim that it does.

Mr. Sawyer: No.

The Court: And that it is an admission.

Mr. Wolf: But the important thing that does apply is the extent of his authority and he had no authority.

The Court: Oh, no, no, no. I will let it in. By Mr. Fabian, he was in charge of the disposition of real estate, so, therefore, he leased it, he bought it, he sold it, he repaired it; he did everything.

Mr. Sawyer: May I point out to Your Honor that the witness can hear all of this discussion?

The Court: All right.

Mr. Sawyer: Is the discussion over?

Mr. Goffman: I take it that Mr. Sawyer is not pursuing this subject now with Mr. Fabian.

Mr. Sawyer: No; that's right.

The Court: I have said that he cannot ask whether he had an agreement or that Wirth ever said he had an agreement with Mr. Goldman, Mr. Smith, Mr. Jones, or anybody else.

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Mr. Sawyer: Right.

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By Mr. Sawyer:

Q. Mr. Fabian, did you discuss your company's policy to take the Aldine Theatre off the market with Mr. Schlanger?

A. Yes.

Q. Who is Mr. Schlanger?

A. Mr. Schlanger was the zone manager of our Philadelphia theatres.

Q. And do you have any letters or memoranda in your file with respect to this policy?

A. I don't think so.

Q. Do you have any letters or memoranda in your files at all with respect to the disposal of this property?

A. Not that I know of.

Q. Do I understand, Mr. Fabian, that here you are disposing

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of a first-run downtown Philadelphia theatre in pursuance of a policy of the company, and that you have no interoffice memos or any letters whatsoever dealing with that decision?

A. The decision would have been arrived at at meetings between Schlanger and Mr. Kalmine, our General Manager, and myself, probably Mr. Rosian, one of our other executives, and Mr. McDonald, our Treasurer.

• • •

Q. And you never put any instructions to the Greenfield office in writing as to what your policy was and what your instructions were to them?

A. I did not contact the Greenfield office myself.

Q. But your company—no letters in your files to the Greenfield office respecting this policy and what instructions you were to give them with regard to the sale?

A. I wouldn't know.

Q. Do you know whether you were asked at any time for any such letters or memoranda?

A. I was never asked for any.

Q. Do you know whether you were asked in connection with this case for any such letters or memoranda?

A. I was not.

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Q. When you say you were not, do you mean you personally were not approached about it?

A. That is right.

Q. Do you know whether or not your attorneys were asked for such letters or memoranda respecting the sale of the Aldine?

A. I don't know.

Q. Do you know in fact whether any such letters or memoranda were produced?

A. I don't know.

Q. Who is Mr. Kalmine?

A. He is the General Manager of our theatre operations.

Q. And is he a vice-president of the Stanley Company of America?

A. Yes.

Q. If the policy of your company was not to sell the Aldine Theatre to anyone who would use it as a theatre, do you know why that wasn't put in the agreement of sale?

A. The agreement of sale was prepared by the attorneys and I don't know why the form was one way or the other.

Q. Prepared by Mr. Wolf's office, is that correct?

A. I believe it was, yes.

Q. I show you the agreement of sale signed by Mr. Kalmine, the Vice-President, and I ask you whether or not

there is any restriction whatsoever in the agreement of sale as to how
(335)
this property is to be used?

Mr. Wolf: Objected to. The agreement speaks for itself. There is none.

Mr. Sawyer: There is none.

Mr. Wolf: There is none.

Mr. Sawyer: Very well. Thank you.

By Mr. Sawyer:

Q. After you found out that the property was intended by the buyer to be used as a motion picture theatre, did you attempt to buy the property back from the buyer?

A. I did.

Q. And when that failed did you attempt to rent the property back from him?

A. No, I never wanted to rent it.

Q. You did not attempt to rent it back?

A. No; just to buy it.

Q. Are you sure there were not any occasions in which you offered to rent the property if he wouldn't sell it?

A. I remember trying to buy it back. I remember negotiations taking place to that effect because I had told Mr. Greenfield that he had given me his assurance that this property was not to be used as a theatre, and he had told me that he had definite assurance from Mr. Sley; and, in fact, in my presence at a meeting with Mr. Sley and Mr.
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Greenfield, Mr. Greenfield told Mr. Sley that he had broken his word to Mr. Greenfield and by doing that Greenfield had broken his word to me. And Greenfield then attempted, I attempted, rather, to buy the property back. Greenfield continued negotiations. He did offer the property to me at a very ridiculous figure, at a rental, and I was not interested in it.

By The Court:

Q. Do you mean to say that you had a conversation when Mr. Sley and Mr. Greenfield and yourself were present?

A. In Mr. Albert Greenfield's office.

Q. Who else was present?

A. Mr. Schlanger was present. There may have been others, but those four definitely were there.

The Court: All right.

By Mr. Sawyer:

Q. Mr. Schlanger is still employed by you?

A. Yes.

Q. What was promised as to the property is contained in this agreement of sale, is it not, Mr. Fabian?

A. I beg your pardon?

Q. What was promised by any buyer with respect to this property and what was to be done with it is in the agreement of sale, is it not, sir?

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Mr. Wolf: Objected to.

Mr. Sawyer: This is cross-examination.

The Court: Well, that is a proper objection because what was promised, what was agreed to is in the agreement of sale.

Mr. Sawyer: Your Honor, since the agreement of sale has been admitted, I would like to read Paragraph 21. Your Honor, I think it is quite relevant, Paragraph 21.

The Court: What does it say?

Mr. Sawyer: "The entire agreement between the parties is contained herein and there are no agreements, understandings or conditions other than those expressly set forth in this contract."

Mr. Wolf: There is no argument on that subject.

Mr. Sawyer: All right.

Mr. Wolf: There is no argument on that subject, but that doesn't mean that there weren't promises made outside of this agreement.

Mr. Sawyer: Your Honor, it says——

Mr. Wolf: Not that they were enforceable. They evidently weren't.

Mr. Sawyer: They cannot impeach their signed, sealed agreement, Your Honor. It says in this agreement,

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"and there are no agreements, understandings or conditions other than those expressly set forth in this contract."

It was drawn by Mr. Wolf's office. It is signed by a vice-president of the corporation.

Mr. Wolf: We are not talking about any promises. We are talking about statements of intention that were made by Siey. To say that we could not show outside of this agreement that he stated that he did not intend to use it as a moving picture house has no basis whatever in law.

Mr. Sawyer: I don't see how they can do it with that confronting them, Your Honor, when a vice-president says that there are no other agreements or understandings.

The Court: Aren't we confronted with the problem as to whether written agreement encompasses all of the arrangements that had gone theretofore?

Mr. Wolf: We don't question that we have no legal right to sue Mr. Siey because he misrepresented what he intended to use the house for. We don't claim that at all.

Mr. Sawyer: Your Honor, this would mean that a written agreement prepared by the attorneys for the

seller and therefore construed against them would have no sanctity at all if this thing had no meaning.

It can't say any more plainly, "the entire agreement between the parties contained herein, and there
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are no agreements, understandings or conditions other than those expressly set forth in this contract."

And this is the inception of the deal, right here. This is the first thing; later is the agreement of sale; later, of course, comes your actual transfer of deed and transfer of title.

Mr. Wolf: Perhaps I don't understand what Mr. Sawyer is trying to say. If he is trying to say that the legal obligations of the purchaser are those set forth in the written agreement, I agree with him 100 per cent. No argument about that. That has nothing to do with what was said at and before and after the time that the agreement was made by Mr. Sley.

By Mr. Sawyer:

Q. I believe, Mr. Fabian, you testified that you on no occasion made an attempt to rent the property from Mr. Sley.

A. I don't recall making any offer to rent, no.

Q. Did you discuss renting it with him? Did you discuss the possibility that you would rent it back from him?

A. I discussed it with Mr. Greenfield and——

Q. No. With Mr. Sley.

A. I don't recall.

Q. Didn't you meet Mr. Sley in New York subsequent to his purchase and didn't you there discuss with him possible terms
(340)
of rental of the theatre?

A. My recollection is that we discussed only a purchase and Mr. Sley made the statement at that time that I, he said, in fact, he made the statement in Greenfield's office,

he made a definite statement, he said, "I own millions of dollars worth of real estate. I have never sold one piece and I don't intend to sell this one."

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Q. Mr. Fabian, were you examined under oath on November 5, 1958, in connection with this case?

A. I assume that is correct, yes.

Q. Your deposition. Now, do you recall meeting Mr. Sley at the Plaza Hotel in New York?

A. Yes, I do.

Q. And do you recall what the subject of that discussion that you had there was with him?

A. I think we had two meetings, one in Mr. Greenfield's office and the one at the Plaza Hotel.

Q. Well, I am speaking of the one in New York.

A. And we had these two meetings, and the conversations in my recollections now have merged and I don't know just what took place at either meeting but I do know what took

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place at the both.

Q. And did you continue to make efforts throughout the year 1955—excuse me. Strike that—1953 to repurchase the theatre?

A. Well, I have talked to Mr. Greenfield on occasion about it and that has been the extent of my effort to repurchase it.

Q. Did you discuss the possibility of reacquiring it with Mr. Schlanger from time to time?

A. Well, Mr. Schlanger and I, he being the zone manager, had many discussions and I am sure this was mentioned at times between us.

Q. Did you ever have any discussions with Mr. William Goldman about the possibility of eliminating competition between the Stanley Warner first-run theatres in Philadelphia and the Goldman first-run theatres in Philadelphia?

A. We had discussions regarding making a split of the product.

Q. Well, does the split of the product mean that you and your theatres do not compete with Mr. Goldman's theatres?

A. On certain pictures, that is correct.

* * *

Q. On any picture that is assigned on that split.

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A. To his theatres, yes.

Q. So that you did have discussions then with Mr. Goldman as to the possibility of eliminating competition between Stanley Warner and the Goldman Theatres in first-run Philadelphia; is that correct?

* * *

The Witness: Only in regard to the purchase of these pictures. We did not eliminate competition between us, no.

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By Mr. Sawyer:

Q. I am not speaking, Mr. Fabian, of competition for the patronage of the public.

To make it clear, I will rephrase it.

Did you have discussions with Mr. Goldman with respect to eliminating competition between your theatres and Mr. Goldman's theatres first-run Philadelphia with respect to the obtaining of film product?

A. We did.

Q. And when did those first discussions take place?

A. Sometime in the late spring or early summer of 1953.

Q. Who was present, first discussion?

A. First discussion, I believe it took place between Mr. Goldman and myself.

Q. Just the two of you?

A. I think so.

Q. Did you consider it would be an advantage to Stanley Warner if Mr. Goldman was not to compete with you in the purchase of film?

A. I thought it was a much more orderly way of distributing and exhibiting pictures to have a split of the product. Yes, I thought it was an advantage to us.

Q. You thought it was an advantage to your company, I take it, or you wouldn't have attempted to bring it about?

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A. Certainly.

Q. And you think it is an advantage to your company?

A. I personally do, yes.

Q. Did it work out that way in the period from July, 1954, until November, 1956?

A. I would say it did.

Q. And isn't it true that you, under this arrangement you know for one thing that you are going to get a picture in advance of when you would know under say open competitive bidding?

A. Well, that is only true, that would only be true if there were not other exhibitors bidding for the picture. But since this arrangement was made subject to the rights of all other exhibitors in the territory, and in the vast majority of cases we had to bid for pictures rather than negotiate for them, we still did not get them very far in advance.

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Q. Isn't it true that as a result of the split that your company is able to know more further in advance that you are going to get a given picture?

A. No. If you wish me to explain it, I will.

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The Witness: Well, the mere splitting of a picture is no indication that we will get the picture. Several processes have to take place. In the first place, it has to be determined whether there are other people in the territory

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who want the picture and, if they do, then the bidding process comes into play.

Secondly, even without bidding there is a requirement to have a negotiation with a film company and arrange for the purchase of the picture. The mere splitting does not assure us of the picture.

By Mr. Sawyer:

Q. Mr. Fabian, isn't it true that at least part of the time the result of the splitting arrangement was that you were able to know well in advance and, therefore, achieve more exploitation of the picture, that you were going to get it?

A. I wouldn't say a great many times but occasionally.

Q. Well, occasionally or part of the time?

A. Part of the time.

Q. Who informed you that that was true part of the time?

A. I would so have been informed, not in detail, but in a general way, by Mr. Schlanger who had complete charge of that kind of setup.

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Q. And also perhaps by Mr. Fellman?

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A. Mr. Fellman would have known, yes.

Q. What does Mr. Fellman do, Mr. Fabian?

A. He is the Executive Assistant to Mr. Kalmine and watches operations and film generally around the various circuits.

Q. And if you eliminate a man with three theatres from doing any bidding or competitive negotiating against

you, you naturally find yourself bidding much less of the time than you would if he were in there; isn't that true?

A. Well, it might be true if there were other exhibitors who wanted the picture.

Q. Well, isn't it true?

I will put the question to you again. Isn't it true that if you eliminate a man with three theatres as a potential competitive bidder against you, that you find yourself bidding much less of the time for the product than if you had to bid against him all the time?

A. I wouldn't say much less, no. Less, probably, but not much less.

Q. Isn't that the whole point of the split, Mr. Fabian?

A. The whole point of the split as between us, we would have that. But it was always subject to the rights of others to get pictures.

Q. I understand that, Mr. Fabian. What I want to know is that isn't the whole point of the split that you are going

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to do a great deal less competitive bidding because under the agreement not to compete in the split three theatres, owned, in this case, by Mr. Goldman, will not be bidding against you; is that correct?

A. That is true.

Q. That is the whole point of it, isn't it?

A. Right.

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The Court: As I understand it, the witness has said—and correct me if I am wrong, Mr. Fabian,——

The Witness: Certainly.

The Court: —that you went to Mr. Goldman to talk about this split and that you felt that if it could be accomplished it would, in a measure, reduce competition between you and Mr. Goldman.

The Witness: Yes, but I wasn't given an opportunity to explain further, Your Honor, if I may, that one of the main reasons why I wanted to make this arrangement with Mr. Goldman or some arrangement was because there had been a long history of disputes and arguments between our two companies.

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The Witness: Between our two companies, and I thought that I had only come into this situation in March of 1953 and one of the first things I thought was that it would be a very good thing to have a more harmonious relationship in Philadelphia so that our people, instead of disputing and arguing, could run their business more efficiently; and that was one of the main elements in my wishing to make an

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arrangement with Mr. Goldman.

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By The Court:

Q. After you had the arrangement or the discussions with

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Mr. Goldman, then did your arguments and differences with him stop?

A. No. We still had the normal competitive arguments and disputations, but they were much less than before. Competitors are never really——

Q. In other words, it reduced your blood pressure a little bit, Mr. Fabian?

A. I would say that would be a very good way to put it, Your Honor.

By Mr. Sawyer:

Q. Well, you weren't competing with him as to the purchase of film, though, were you?

A. We were not.

Q. So you didn't have any arguments about that any more, did you; whatever your arguments, they were about something else, were they?

A. Well, I must say that really these matters, whatever arguments and disputations took place, would be known more to my people in the Philadelphia zone than myself because they are in active day-to-day operation of the theatres.

Q. Well, Mr. Fabian, you would agree with me, wouldn't you, that you can't argue with somebody about something in which you are not competing with him? You can't have any disputes and arguments if you are not competing for the

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film, can you?

A. I suppose not.

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Q. Now could you tell me some of the people, Mr. Fabian, either in your organization or outside of it, that you met with to implement this arrangement with Mr. Goldman?

A. We met with the Paramount people, Paramount.

Q. Who was present at that meeting?

A. There was present Mr. Schwalberg, the general sales manager of Paramount, and Mr. Austin Kehoe, who was their general counsel. I believe Howard Minsky, one of their sales executives, was also present. There was Mr. Goldman, Mr. Beattie, I believe, and I was present.

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Q. Was there an agreement reached at that meeting?

A. There was, if not at that meeting at a subsequent—there may have been two meetings; but nevertheless the same people would have been present.

Q. What was the agreement?

A. The agreement was that Paramount also consented to the splitting arrangement between the Goldman Theatres and ourselves, and with two provisos. The first was that they would arrange the splits, that is, the pictures on each side; and secondly that it must be distinctly understood that other exhibitors in the territory would have the right to compete, either by bid or negotiation, for the pictures.

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Q. Was there a written agreement arrived at?

A. There was not.

Q. Where did this meeting take place, Mr. Fabian?

A. In Austin Kehoe's office in New York, in the Paramount Building.

Q. Had you met before that with any other distributors in respect of your agreement with Mr. Goldman?

A. No. I spoke on the phone to Mr. Kalmenson, who was the Vice President and General Sales Manager of Warner Bros.

Q. What did you say to him?

A. I informed him that Mr. Goldman and I had decided we would like to split his product in Philadelphia and Mr. Kalmenson had not met Mr. Goldman and he said that he would like to see him personally, meet him personally, and see his theatres and he would then decide whether he would consent to splitting.

He wanted to know the man he would do business with. He had not done business with Goldman here prior thereto.

Q. When did this discussion or these discussions that you are talking about now take place?

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A. All in the late spring and early summer of '53.

Q. Did you ever discuss with Mr. Goldman the disposition that your company was then trying to make of the Aldine Theatre?

A. Never discussed it with Goldman.

Q. After Mr. Sley purchased the theatre, did you ever discuss it with Mr. Goldman?

A. No.

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Q. Did you ever discuss the possibility of splitting products between Stanley Warner and the Viking Theatre?

A. No. We never discussed it.

Q. Did Mr. Goldman make the request to you originally? You told me that you went down to see him about it.

A. Mr. Goldman, I went down to see Mr. Goldman, as I said, the main purpose being to eliminate the disputes and bickerings that were taking place between our companies.

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Q. Mr. Fabian, you were the one that initiated the discussions with Mr. Goldman, you testified, is that correct?

A. Yes.

Q. You went down there to Philadelphia because you thought that if you could get this arrangement with Mr. Goldman it would benefit Stanley Warner, is that correct?

A. If I could get the whole atmosphere cleared up.

Q. Now, you weren't deterred from seeking out Mr. Goldman and seeking this arrangement by the fact that he hadn't approached you, were you?

A. Well, Mr. Goldman and I have known each other a good many years.

Q. Were you deterred or not, Mr. Fabian?

A. Of course not. We knew each other too well.

Q. You didn't wait for him to come to your door, did you?

A. No.

Q. But you did not go and did not approach the Viking management in any way on this subject at any time, is that correct? Not why, but you didn't, did you?

A. In that particular period he was getting a lot of film,

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a lot of Metro pictures and others. I didn't think he would want a split.

I understand that there have been occasions when a split has been offered by other people, gratuitously, probably, trying to be helpful in the situation, and he has refused it. That is merely what I have heard.

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Q. Now, at this time was the Fox playing exclusively Twentieth Century-Fox product? When I say "Fox" I mean Fox Philadelphia Theatres. Was it?

A. Yes, sir, it was.

Q. Did Mr. Schlanger ever talk to Twentieth Century-Fox about getting Fox product?

A. After the advent of Cinemascope we had equipped one of our theatres, and Twentieth Century-Fox was the only company at that time making Cinemascope pictures, and he was very anxious to attempt to get one or more pictures for the theatre.

Q. Did he report to you on this subject?

A. Not in detail. There was no necessity.

Q. Was there an agreement reached that some of the Twentieth Century-Fox product would go, would be made available to you and Mr. Goldman to be put on the split?

A. No, sir, there was no such agreement.

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Q. Was the agreement on the contrary that you would not bid for Twentieth Century-Fox product against the Fox Theatre?

A. There was no agreement.

Q. Wasn't that your policy at that time?

A. Well, we thought that as long as the Fox Theatre was playing exclusively Fox pictures there was no purpose

in our trying to take Fox pictures away from them in any quantity, because they would then try to get other pictures in the market, and there would have been no gain or loss one way or the other.

Q. May I ask you again, then, Mr. Fabian, whether the policy of Stanley Warner at this time and throughout the period of this suit, was not to bid against the Fox Theatre for the product of Twentieth Century-Fox?

A. It was our policy not to bid, but we did try to get a few Cinemascope pictures. We did get one I believe.

Q. And were there occasions when the Fox Theatre was bidding for them?

A. I don't recall.

Q. It was your policy—if you listen to my question, I believe, Mr. Fabian, the question I asked you was whether it was your policy of your company not to bid and seek Twentieth Century-Fox product if Fox Philadelphia was bidding for it.

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The Witness: If you say bid, yes, but we certainly sought to get some Cinemascope pictures, Mr. Sawyer.

By Mr. Sawyer:

Q. But you never sought to get them when Fox Theatre Philadelphia was seeking to get them, did you, sir?

A. No, we talked to Twentieth Century-Fox, not to the theatre company.

Q. I understand.

A. So that in effect we did seek them even though Fox Theatre in Philadelphia did not want to give them up.

Q. Was there ever an occasion, Mr. Fabian, ever an occasion, when your company, Stanley Warner, sought to get a picture from Twentieth Century-Fox, the distributor, when the Fox Theatre was after it, bidding it, trying to get it?

A. Yes, sir, there was.

Q. When?

A. Well, the picture How to Marry a Millionaire, the second Cinemascope picture, we went directly to the picture company, Mr. Schlanger informed me, and got it from them.

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Q. But the Fox Theatre didn't bid on that picture, Mr. Fabian.

A. My understanding is that they wanted it.

Q. Well, they didn't bid on it, did they?

A. I don't know. I have no knowledge.

Q. Now, who would negotiate adjustments for Stanley Warner first-run Philadelphia?

A. The local Philadelphia office.

Q. And who would that be in the local Philadelphia office?

A. Well, at that time I——

Q. This is during the suit period. 1954, 1955, 1956, if it changed during that period you might give me the succession of people who had that.

A. I guess it was Mr. Minsky was our film buyer.

Q. Which Mr. Minsky?

A. Ted Minsky.

Q. Did Mr. Schlanger have anything to do with that?

A. And Schlanger. Of course, he was under Mr. Schlanger's supervision, Schlanger being the Zone Manager.

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Q. Oh, I wanted to ask you this, sir, I knew there was something. Did you consider that the Mastbaum had as good a location as your other theatres in Philadelphia?

A. Substantially, yes.

Q. You don't think a couple of blocks makes any difference?

A. Not too much.

Q. Did you have a feeling that it was obsolescent?

A. Well, I had a feeling that because of the scarcity of pictures, and its size, and the cost of operation, that it was probably more inefficient than our other theatres, yes.

Q. Well, the scarcity of pictures didn't make it inefficient, did it? Was it obsolescence, Mr. Fabian?

A. Well, it was, if you might say these large theatres that were built essentially for stage shows and the best pictures, a combination show of that character would be called obsolescent yes. But with the opportunity to obtain the best picture, it might still keep going for a long time.

Q. Well, it got the best pictures during this suit period, didn't it?

A. Oh, no, no. It got some of them. Just some of them, Mr. Sawyer, just some. It got many inferior pictures too.

(377)

Q. What about GIANT, with Elizabeth Taylor?

A. I assume so, I wouldn't remember.

Q. Do you except MR. ROBERTS?

A. Well, I said it got some, but it got many inferior pictures also.

Q. ALEXANDER THE GREAT?

A. Pardon?

Q. ALEXANDER THE GREAT?

A. I wouldn't know offhand.

Q. Did it play HELEN OF TROY?

A. I don't know offhand. I think that it might be interesting to know what the theatre played in between those pictures.

Q. It played THE HIGH AND THE MIGHTY, did it, Mr.

A. I am——

Q. TO HELL AND BACK?

A. If you have the record there I am assuming that it is correct.

Q. SOLID GOLD CADILLAC, VERA CRUZ; these were some of the biggest pictures of the time, weren't they, in this period?

A. They were very good pictures, those that you mentioned.

Q. Now, what kind of condition was the Stanton Theatre in when you acquired it?

A. Not too good.

Q. Do you mean physically?

(378)

A. Physically, yes.

Q. Did you remodel that theatre?

A. We did, spent a lot of money on it.

Q. When did you remodel it?

A. In 1955, I think.

Q. When?

A. 1955—1956, that is my recollection.

Q. When you remodeled it did you cut down the number of seats?

A. Yes, came down some. We put in an escalator and did a number of other things to make it a first-class theatre.

Q. Did you find it a tendency, Mr. Fabian, to reduce the number of seats in large theatres?

A. Somewhat, yes, sir. There is more space in between seats now.

Q. By the way, was Mr. Goldman ever associated with the Stanley Company?

A. Yes, he was. I think he was—he was associated until about 1933, I think.

* * *

(380)

CROSS-EXAMINATION.

* * *

(381)

By Mr. Wolf:

Q. You said that you became the head of Stanley on March

(382)

1st, 1953; is that correct?

A. That is correct.

Q. And as the head of the company and president were you responsible for its ultimate policies?

A. Subject to our board of directors, yes.

Q. And have been during all the period from 1953 until the present time?

A. That is right.

Q. Did you have any familiarity then and do you now with the moving picture situation in the central part of Philadelphia?

A. Yes.

Q. How did you acquire that knowledge?

A. By studying the records of our company and examining the theatres.

Q. During the course of your career were you involved in any way in the operation of the theatres that now are part of the Stanley operations in the central part of Philadelphia?

A. Yes. Between the period of 1926 and 1928 I was connected with the Stanley Company of America and at that time became familiar with the theatrical situation in downtown Philadelphia.

Q. At the time that you became the president of Stanley Company, how many first-run theatres did that company have

(383)

in Central City?

A. Five.

Q. What were they?

A. They were the Mastbaum, Stanley, Stanton, the Boyd and the Aldine. Well, they had the Earle but they had closed it up and it was being converted to a store at that time.

Q. The Aldine is the theatre that now is called the Viking; is that correct?

A. That is correct.

Q. What is its location?

A. At 19th and Chestnut.

Q. Do you remember what other first-run houses there were in Central City at that time?

A. Well, there were the Midtown, the Goldman and the Randolph, the Fox Theatre, Trans-Lux, the Arcadia, the World I believe, and I am not certain whether the Studio operated on first-run at that time or not.

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(384)

Q. Are you familiar with what the

(385)

picture situation with the first-run houses in Central City was at the time you took over on March 1st, 1953?

The Witness: Yes, I was familiar with them.

• • •

Q. What was it?

A. Well, these theatres were all bidding for product, all were playing first-run, and it was a matter of having—we were having a great deal of difficulty in supplying all of our theatres with film because there just wasn't enough film to go around, and there was a shortage of film at that time of considerable extent.

Q. What kind of pictures were you playing in your houses?

A. Well, we were playing the best we could get but the best we could get included some good ones, some fair ones and quite a few bad ones.

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(386)

Q. Did you make a decision to close some of the houses that then were open?

A. We made a determination to close some of the houses.

Q. And for what reason?

A. For the reason that we didn't have enough pictures to go around; too many mouths to feed.

Q. Do you remember that the Earle had closed just a month before that?

A. The Earle had closed prior to the time I took over, in March of 1951.

Q. And what became of that?

A. And it became, it was converted to the W. T. Grant store.

Q. Where is it?

A. 11th and Market.

Q. Did you say 1951?

A. I beg your pardon. I said prior to 1953 that closed.

Q. And when did you decide to convert the Boyd to Cinerama, after you had made the decision you just mentioned?

(387)

A. Yes, that was one of the decisions that was made.

Q. That left you with how many first-run theatres in Central Philadelphia?

A. Well, that left us with the Mastbaum, the Stanton, the Stanley and the Aldine.

Q. Did you make any decision to close the Aldine?

A. We made the decision at that time to close the Aldine also.

Q. And why of the four houses that you had did you decide to close the Aldine?

A. Well the Aldine was the house that had inferior appointments, it had no cooling plant, it required a great deal of refurbishing and we estimated that its location was inferior to our other theatres and would be the logical one to dispose of.

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(388)

Q. What was the reputation of the Aldine with distributors?

* * *

The Witness: Well, I think one indication of its reputation is that we had great difficulty in booking

(389)

the house. The distributors did not want to put pictures in there because they felt that it was an inferior theatre compared to the rest of the theatres we had.

* * *

Q. When you decided to close the house, what plans did you make with respect to what should be done with the property?

A. Well, we considered several things. We considered converting it ourselves to other purposes, we considered tearing it down, we considered disposing of it by sale but always for the purpose of not having it used as a theatre, and we finally disposed of it because we assumed it would be a parking garage and would be available for parking for our theatres in the neighborhood.

Q. In connection with the disposition of the Earle, and in connection with the conversion of the Boyd, and in connection with the closing and intended disposition of the Aldine, did you reach your conclusions as a result of any agreement or any discussions with any other exhibitors?

A. None whatever. Strictly a company matter.

Q. Or with any distributors?

A. No, definitely not.

Q. Specifically, did you reach those decisions as a result of any discussions with Mr. Goldman?

(390)

A. Definitely not. Never have we talked to him about it.

Q. What was the basis on which you reached your decision to close these houses?

* * *

The Witness: Well, the whole problem was being able to book these theatres. There weren't enough pictures and we just felt we had to have less theatres in the town.

By Mr. Wolf:

Q. Was your decision influenced or suggested by any of these other exhibitors or by any distributor?

A. Definitely not.

Q. You have said that you did not close theatres as the result of any agreement with Mr. Goldman. Is there anybody in your company who would have had authority to make any agreement with Mr. Goldman respecting the closing of any of those theatres?

A. No, nobody in the company would have such authority.

Q. Are you the only person who would be able to make that decision?

A. It would finally have to come to my desk, yes.

Q. You have heard Mr. Wirth mentioned this morning, in

(391)

fact, you mentioned him. Would he have had authority to enter into any agreement with Mr. Goldman respecting any of these theatres and specifically the Aldine?

A. Certainly not. He had no authority whatever. He wasn't an officer of the company and he certainly wouldn't have any authority.

Q. Was he a director of the company?

A. He was not a director.

Q. Did he sit in on the meetings of the directors?

A. He never sat with the directors, no.

Q. Did the jurisdiction of his department extend to the matter of your relations with other exhibitors in Philadelphia?

A. Never. He was solely in the real estate department.

Q. Or with other distributors in Philadelphia?

A. No.

Q. Had he anything to do with the exhibition business or the operation?

A. He had nothing to do with the operation of theatres whatever.

Q. Nothing with the operation of theatres?

A. That is correct.

Q. By the way, he has died?

A. I beg your pardon?

(392)

Q. He has died, Mr. Wirth.

A. Yes, he died.

Q. Died when?

A. About three years ago, I think.

Q. He died in 1957.

Did he have authority to execute any agreement of sale for the company?

A. Never. It would have to be executed by an officer of the company.

Q. Did he ever execute any agreements of sale?

A. He couldn't do that because it would have to be signed by an officer of the company subject to the approval of the board of directors as the disposal of a corporate asset.

Q. Did his authority extend beyond negotiating for the sale or leases of your properties?

A. No. All he could do was to present such offers as he received to his superiors and if the deal was proper then continue to implement the closing, and so on.

Q. Is that what he did in the case of the Aldine?

A. That is correct.

Q. Just tell us exactly what he did do in that case.

A. When we decided to dispose of the Aldine, we suggested to Mr. Wirth that he secure a customer, if possible. He proceeded to search the market for a customer and finally

(393)

the Greenfield office, one of the brokers he went to, found a customer in Mr. Sley.

Q. And presented an agreement for the sale of the theatre?

A. He presented an agreement for the sale of the theatre, that's correct, and we approved it.

Q. And that was the agreement that was approved and signed by Mr. Kalmine, correct?

A. That is correct.

Q. Did Mr. Wirth ever discuss with you the question of your relations with Mr. Goldman in connection with the sale of the Aldine Theatre?

A. Never, never discussed anything with me about Mr. Goldman.

Q. Was that a thing within the jurisdiction of his department?

A. Certainly not.

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(396)

Q. In any event, the agreement was signed and the property ultimately sold through sale?

A. That is correct.

Q. Now, before the settlement was made for the theatre, which I think you said was in September of 1953——

A. That is my recollection.

Q. —you had had a meeting with Mr. Goldman; is that

(397)

correct? You had had a meeting with Mr. Goldman?

A. That is right.

Q. And Mr. Goldman you said was an old friend of yours?

A. Yes.

Q. You were aware of the fact that there had been arguments and disputes between Mr. Goldman and the previous management of the Stanley Company?

A. That is right.

Q. And what was the purpose of your going to see Mr. Goldman?

A. I was very anxious to clear the atmosphere and eliminate these disputes to the extent possible so that we could have some semblance of peace in Philadelphia.

Q. Where would that meeting take place?

A. The meeting took place in Mr. Goldman's office in Philadelphia.

Q. Now, will you tell us who suggested the idea of arranging or trying to arrange a split of pictures here?

A. Well, I told Mr. Goldman that I had hoped that we could get ourselves on a more harmonious basis of competition, and he suggested——

Q. I don't hear you.

A. —he suggested that one of the ways to eliminate a great deal of the disputes was the splitting of this product

(398)

and this was the first time this was suggested to me.

Q. Are splits of product unusual in the motion picture business?

A. Oh, no, sir.

* * *

(399)

The Witness: The question is, is splitting done more—is it a usual thing in the business?

By Mr. Wolf:

Q. The normal thing.

A. Normal.

Q. Yes.

A. It is usual and normal in many situations all over the country.

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(419)

Q. Would you tell us the substance of the agreement that was reached in Mr. Kehoe's office when you went there with Mr. Goldman?

* * *

(420)

A. We reached an agreement that the pictures would be split, with two provisos by Paramount. They insisted, first of all, that they would do the actual splitting in determining which pictures would go on either side.

Secondly, that there was a clear indication that other exhibitors would have the right to compete for these pictures if they so desired.

Q. Now, as far as other exhibitors were concerned, what would be the obligation of Stanley if it wanted a picture for which other exhibitors made a bid?

A. It would be largely determined by the distributor. The normal thing would be they would have to bid.

Q. Who would have to bid?

A. The Stanley would have to bid for their picture.

Q. Then who would determine which of the bidders would receive the pictures?

A. The distributor is always the final word, it always allocates the picture to what it considers the winner.

Q. We have heard before about the benefit to the exhibitors, you and Mr. Goldman, of not having to bid against each other. Was there any benefit, and if so, what, to other exhibitors who might want to bid for the same picture?

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(421)

The Witness:

* * *

Ther is no question that just the same as we not having to bid against the three Goldman theatres, in the same way any other exhibitor who desired a picture on our split did not have to bid against the Goldman theatres either, and the same thing happened in the case of a picture that was on the Goldman split, these other exhibitors would not have to bid against the Stanley Warner theatres. So that they had a distinct advantage in having eliminated on either split three important theatres to bid against.

By Mr. Wolf:

Q. If it had not been for this agreement which you and Mr. Goldman entered into to split, what would another exhibitor, a third-party exhibitor, have had to do in order to secure a picture?

A. He would have had to bid against both of us, in other
(422)
words, all other theatres in the territory, rather than exclude either the three Goldman or the three Stanley theatres.

Q. Was there any length of time that the agreement was to last or could it be terminated at any time?

A. It could be terminated at will by—I suppose by any of the parties, especially by Paramount.

Q. And did it cover all their pictures or just such as they chose to put on the split?

A. Just as they chose to put on.

Q. As far as Mr. Goldman's arrangement with the companies that you have named in securing pictures that were on his side of the split did you have anything to do with that?

A. Nothing whatever. Whatever arrangements he made with the distributors were strictly his business.

Q. Did you discuss that with him or with the distributors?

A. Never.

* * *

Q. When you reached this agreement with Goldman and with Paramount, and later with Warner, with whom else did you discuss it in the amusement business?
(423)

A. With nobody except people in my own organization.

Q. With any of the other distributors?

A. Definitely not.

Q. Any of the other exhibitors?

A. No.

Q. As far as the arrangements with Warner Brothers were concerned what were the conditions of their agreement to the split?

A. Their agreement was similar to Paramount, except that they consented to our making the split ourselves, but it was still always subject to the right of other exhibitors to compete for the pictures.

Q. Just explain a little bit, because it is rather interesting, what you mean by saying that they agreed to your making the split; what did that mean?

A. Well, the usual method is that a group of pictures, we will say six pictures, are on the release schedule of the Paramount Company or the Warner Company, and either Goldman or Stanley will arrange a split of these two products, three and three, three on each side. Then the one who does not arrange the split has the right to the first pick of these two groups. The next group of six pictures will be split by the other party, and the one who didn't pick the first time then has the opportunity to have the first pick as (424)
between the two groups.

Q. At the time that you and Mr. Goldman made these arrangements with Paramount and Warner did you know that Mr. Sley had bought your theatre?

A. No, Mr. Sley had not—when this arrangement was made with Paramount and Goldman we had not yet sold the theatre. So it was still our property.

Q. Who owned it?

A. Stanley still owned it.

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(427)

Q. You have spoken before about the effect of the split. Will you tell us what you and Mr. Goldman had to do after the pictures were set up on the split in order to obtain those pictures for your houses respectively?

A. Well, we had to arrange to make an agreement to license the pictures with the distributors, if we desired to play the picture.

Q. Did the split give the amount that was to be paid to show the picture?

A. The split did nothing other than to arrange those pictures which would be available for us to try to negotiate for or bid for, and those that Goldman would try to get; and after the split had been made it was then up to us to

arrange terms with the distributor, if we could and if we desired to do so, because some of these pictures we never even wanted after they were split; they weren't suitable and if any other exhibitor in the territory wanted a picture we would be, as a rule, forced to bid against him.

(428)

Q. You say you were not forced to take the pictures?

A. We were not forced to take the pictures. It was our own choice whether we desired to take the picture or not.

Q. Did you always get the pictures that were on your split?

A. Most certainly not.

Q. Why not?

A. We lost many pictures on our splits through competitive bids, or competitive negotiations, and so on.

Q. Why would you fail to get them?

A. We lost them to other exhibitors in the territory.

(431)

"Q. After Mr. Sley got the Aldine and you fund that you could not buy it back from him, what did you do to try to keep him from getting pictures on reasonable terms?"

The Court: I will rephrase it.

By The Court:

Q. Did you do anything to prevent him from getting pictures on reasonable terms?

A. No, sir, other than open competition.

(433)

By Mr. Wolf:

Q. Will you tell us what was said at the meeting that you had with Mr. Greenfield after you learned that Mr.

Sley had become the purchaser of the property and intended to use it for a motion picture house? Will you tell us what was said at that meeting, if Mr. Sley was present?

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(434)

The Witness: Mr. Greenfield arranged a meeting in his office in Philadelphia and I went there and there was present Mr. Sley and Mr. Greenfield, Mr. Schlanger, and myself. There may have been other people there, but I can't recall any of them.

Mr. Greenfield told Mr. Schlanger emphatically that he had given me the assurance that this property would not be a theatre and he was very emphatic in his language, very strong to the point where he used strong language and perhaps even called—not perhaps, but did call Mr. Sley some names and stated to Mr. Sley that, "By breaking your word to me, you make me break my word which I have given this man that the theatre would be converted and would become a parking garage."

Mr. Sley merely stated, "I have the right to change my mind. I admit that I gave you that assurance, but I have a right to change my mind and I have changed it and I intend to make it a theatre."

Mr. Greenfield at that time pulled out a paper and said, "Why, here is even before me the application that you made for a mortgage and the application calls for the building to be used as a parking garage."

(435)

Mr. Sley merely stated, "I still reserve the right to change my mind. I have bought the property and I intend to convert it—I intend to re-embellish it and make it a theatre, continue it as a theatre."

That was the general tenor of the meeting.

By Mr. Wolf:

Q. At any time before this suit was brought did you receive any complaints from Mr. Sley with respect to the splitting arrangement you had with Mr. Goldman?

A. No, I never did.

Q. Did he ever apply to you to be admitted to the splitting arrangement?

A. No, he never did.

Q. Did you ever hear from his lawyers with any complaint?

A. Well, not personally, no.

Q. I mean, did your company ever get any letters from him about complaints?

A. Not to my knowledge, no.

Q. About the split?

A. Oh, no. I never did.

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(436)

By Mr. Nizer:

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(441)

Q. Now you told us that you made decisions to sell the Aldine, which is now called the Viking since Sley took it over.

(442)

When you made that decision did you discuss that matter directly or indirectly, or anybody on your behalf, with any representative of the defendant, Paramount Film Distributing Corporation?

A. No.

Q. Did you discuss it with Twentieth Century-Fox Film Corporation?

A. No.

Q. With Loew's Inc.?

A. No.

Q. Columbia Pictures, Inc.?

A. No.

Q. Universal?

A. No.

Q. United Artists?

A. No.

Q. RKO?

A. No.

Q. Warner Brothers Distributing Company?

A. No.

Q. When you closed the Mastbaum Theatre, as you testified, did you consult with any of the defendant distributors about it or was it your own individual decision?

(443)

A. It was strictly our own company decision.

Q. Mr. Sawyer asked you about the split of Paramount and Warners. Before or after the split did you ever ask any motion picture distributor of the companies that I have mentioned to give you and the Stanley Warner Theatres, at Stanley Theatres, preferential treatment over any other exhibitor, including the Viking?

A. Never.

Q. Did you ever have any understanding or arrangement with any of the defendant distributors to give you a preferential treatment over any exhibitor, whether the Vikink, Trans-Lux, Goldman Theatre, Midtown, or any other first-run theatre?

A. No.

Q. And was any such promise, directly or indirectly, ever made to you by any film motion picture distributor?

A. No.

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(444)

The Court: It seems to me, Mr. Sawyer, that in your examination you inquired about the split and then you say it is your contention that it gave Goldman and Stanley Warner preferential treatment.

Mr. Sawyer: No, sir, no, sir.

The Court: On competitive—competition.

Mr. Sawyer: It gave them an advantage.

The Court: Right.

Mr. Sawyer: But I didn't try in any way, nor do I, to allege, Your Honor, that the split per se, itself, the agreement that these two chains won't compete, is a part of or that thereby the distributors have also agreed to

(445)

discriminate against the Viking.

Now we say that they did, but that doesn't necessarily follow from the split, and I certainly didn't suggest that with this witness. I confined myself with this witness to the establishment of the split and the motives there for it on the part of his company, that it was an advantage to them and to Goldman—nothing about whether or not he induced distributors or attempted to, to discriminate against the Viking.

Now that wasn't part of my examination of this witness at all.

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(454)

FOURTH DAY

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(481)

By Mr. Nizer:

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A. All exhibitors, yes.

Q. In other words, you are not relying any more on the clients that I represent but trying to get some pictures into the market by making them yourselves; is that it?

A. Well, at least let's say we are going to try to supplement your efforts.

(482)

Q. All right. Did the Stanley Company at any time ask any of the motion picture distributors, Loew's, Columbia, Universal, Paramount, to deprive any exhibitor, including the Viking, from bidding or negotiating for any picture on a split, or otherwise, in the same way that the Stanley Company had a right to bid and negotiate on a picture?

A. Never.

Q. Did your Stanley Company ever ask any defendant motion picture company, Loew's, RKO, Paramount, or all the others, to withhold from the Viking Theatre, or any other theatre, the same kind of consideration which the Stanley Company asked for itself?

A. Certainly not.

Q. Was any such promise ever made to you directly or indirectly by any of the defendant motion picture company-distributors?

A. Never.

(483)

Q. When your company, the Stanley Company, bids or negotiates a contract with any motion picture distributor,

does it deal with that one distributor alone or do you request any other motion picture distributor to assist or to intervene in that deal?

A. We deal only with the individual distributor.

Q. In other words, when you try to make a deal or contract with the Metro Company, do you ever have any relationship with any of the other motion picture companies in connection with that deal?

A. No.

Q. Is every deal made individually between your Stanley Company and the individual distributor involved?

A. It is.

Q. And is it made picture by picture?

A. Yes.

Q. And not for a whole season's product?

A. That is correct.

Q. And is it made for each particular theatre?

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(485)

Mr. Sawyer: Your Honor, that has no connection with the matter that Mr. Nizer has asserted.

I asked this defendant whether or not after he had formed this agreement with Mr. Goldman he went to other distributors or to the distributors to discuss with them and clear it with them, and he said that he did not.

The first point is that since he said he did not, there is nothing that can be cross-examined upon from a man representing this defendant-distributor. That is point No. 1.

And, secondly, that has nothing to do with block bookings, which is what he is talking about now.

(486)

There isn't anything about block booking in this case. He is talking about block booking. Did you go out and buy your pictures for a whole year.

Now, we know that practice has been condemned and we are not charging it here.

Mr. Nizer: I object.

The Court: Now, let Mr. Sawyer conclude.

Mr. Sawyer: And, therefore, Your Honor, this is well out, not even close, it is well outside the scope of my examination.

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(487)

The Witness: It is.

By Mr. Nizer:

Q. Does each defendant distributor company—Loew's, Fox, Twentieth Century-Fox and so on—have its own group of salesmen?

A. They do.

Q. And its own Sales Department?

A. Yes.

Q. Does the salesman of each company visit various exhibitors in Philadelphia to sell pictures for his own company?

A. Yes.

Q. Now, with respect to the split I would like to ask some questions.

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Q. Before turning to the split directly, Mr. Fabian, I have only two questions:

Did you ever speak to any motion picture distributor with respect to an effort to influence his judgment concerning the adjustments that were to be given to Viking Theatre?

A. Never.

Q. When I say "you" I mean anybody on your behalf to your

(488)

knowledge.

A. No.

Q. Did you ever talk to any motion picture company with respect to the advertising at the Viking Theatre?

A. Never.

Q. Did anybody on your behalf?

A. No.

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(493)

Q. Now, Mr. Fabian, on the question of split, I would like to see if I can make a little clearer the subject which you have been questioned about.

You have told us that the split, let us say, of the Paramount or Warner pictures was set up on a list of two sides, Stanley Warner and Goldman, is that right?

A. That is correct.

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Q. Does that list contain the pictures for the whole season?

A. No, just those that are about to be released within the next few months probably.

Q. So that as a few more pictures come down the pike, to use the expression of the industry, Paramount would say, this is available to Stanley Warner and this is available to Goldman, under that split arrangement, is that right?

A. That is correct.

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(494)

Q. Let us say there are three pictures on your side, and they are going to come out in the next three months, say, and three on Goldman's side, are there any terms at which those pictures will be played on that list?

A. No. On the splitting lists are only the bare titles of the pictures, because we are familiar with the casts, naturally, and as to the terms there is no indication as to what the terms will be.

Q. Is that indication of what the terms will be the subject of any understanding in any other place at the time the split is made.

A. There is no reference to it made when the split is made.

Q. And if Stanley Warner doesn't want a picture which he has been given an opportunity to bid for on the split do you pass up the picture?

(495)

A. Certainly. If the picture doesn't suit our needs or we haven't the playing time, we pass up the picture.

Q. When you say you haven't the playing time you mean if there is a specific date necessary for a picture, preferred playing time, is that what you meant?

A. That might be also the case, yes.

Q. Now, does the Stanley Company pass up any pictures on a split, not even attempt to bid or negotiate for them?

A. Yes, sir, many inferior pictures.

Q. Inferior pictures?

A. Yes.

Q. On the other hand, if you want the picture, Paramount, let us say, whose picture it is, finds that the bid or negotiation that you have made for it is not to its liking, is it under any obligation to sell it to you?

A. Definitely not.

Q. Or similarly to the Goldman side, to Goldman?

A. That is correct. They have perfect freedom of action with the pictures.

Q. And that freedom of action means that all the other 11 or 10, whatever the theatres are on the outside first-run

of yourself, your three, have the same bid or negotiations you have.

A. That is right.

(496)

Q. (Continuing) For that picture which is listed on your split.

A. That is right, yes.

Q. And they have the same right to bid or negotiate for that picture which is on the Goldman split?

A. Yes.

Q. Now, does the Viking Theatre, the plaintiff's theatre, negotiate or bid for a picture which is listed on a split, let us say, on your side of the split? Does it bid or negotiate for it?

A. Yes.

Q. (Continuing) When it wishes to, as you do?

A. Yes.

Q. And if its offer is accepted does it obtain that picture, though it is listed on your split?

A. It does.

Q. Is the same true for the Goldman side?

A. Yes.

Q. If the Viking gets the picture, bids for it.

A. Yes, correct.

* * *

(497)

Q. Now, is it also true that all the split of a company's product doesn't include all the pictures of that company?

A. Well, some of the inferior pictures are not split and also some of the very best are not split. In the case, for instance, of a picture like BEN HUR, this is a picture that a company makes once in its whole lifetime, and what can you split against BEN HUR? So that it is very difficult to split pictures of that kind.

Other companies, while they haven't pictures as big as BEN HUR, consider that they would prefer to have the whole market compete for them and they don't split them.

But, as a rule, inferior pictures and some of the very biggest blockbusters are not split.

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(499)

Q. Under the split arrangement you limit your opportunity to bid to only those pictures which are on your side of the split and cut out from your area those which are on the Goldman side?

A. Yes, that is one of the prices we pay for the split. We eliminate ourselves from an availability of half of the market—approximately half of the market for pictures.

Q. Whereas an outside exhibitor, let us say Viking, can bid for 100 per cent of the pictures, not just 50 per cent.

A. Yes.

Q. Or whatever is on the split.

A. That is right. The whole market is available to all the other exhibitors.

Q. I think you mentioned in answer to Mr. Sawyer's examination that you understood that there were some offers made to Viking to split, and you commented upon that.

My question is, at that time what kind of pictures was the Viking playing without a split?

A. Well, I understood at that time, some of my people reported to me that one of my bookers in Philadelphia had talked to Mr. Wren, I believe he told me, and said that a split might be arranged, would they be interested.

And Mr. Wren stated that he thought that he

(500)

had Metro pictures for a substantial part of his playing time and he didn't think he would be interested.

Q. At the time that Mr. Sawyer referred to, when you arranged the split with Mr. Goldman for the Paramount pictures, was the Viking Theatre in existence?

A. No, it was still the Aldine, still owned by Stanley Company.

Q. You have already testified, I refer to it, that at all times both the Warner and the Paramount split arrangements were subject to the rights of any others then in business or coming in the future into the business to bid for those pictures, right?

A. That is correct.

Q. So that under that provision, when the Viking later opened, it still had the right to bid, is that right?

A. Yes, that is right.

Q. (Continuing) For any pictures on your side of the split.

A. Yes, that is so.

Q. Or on the Goldman side of the split.

A. That is so.

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(502)

By Mr. Young:

Q. Mr. Fabian, when you testified a moment ago that all the pictures that played at the Viking were on one side or other of the split, that did not include Twentieth Century-Fox pictures that played the Viking, did it?

A. I don't recall stating that definately.

Q. Let me rephrase it: Twentieth Century-Fox pictures were not on the split, were they?

A. They were never split, no.

Q. Now, this split between you and Mr. Goldman was only between the two of you, was not that correct?

A. That is correct.

Q. Fox Theatre was not a party to the split, was it?

A. No.

Q. Did you have any understanding with Mr. Goldman whereby the Fox Theatre would play only Twentieth Century-Fox pictures?

A. I had no such understanding with anybody to that effect, no.

(503)

RE-DIRECT EXAMINATION

By Mr. Sawyer:

Q. You testified, Mr. Fabian, that one of the problems with the Aldine, as you looked at the situation when you took it over, was that it was having trouble getting product from the distributors, quality product; is that correct?

A. That is correct.

Q. And when you took it over, in fact, the very month you took it over it was playing a movie called BWANA DEVIL, wasn't it?

A. Well, it played BWANA DEVIL. I can't identify the date, exactly.

(504)

Q. March of 1953?

A. Yes.

Q. And that was one of the top pictures of 1953, was it not?

A. No, it was not.

When you refer to it as a top picture, it was a picture that was made in a brand new process, and was made in a manner which you might call—what we call a quickie, which means it had a very inferior production quality, and it was a 3-D picture, which meant third dimension, and it was put in the Aldine as far as I know. I had nothing to do with the booking myself. It was not a top picture.

We were very uncertain as to what it would do, frankly.

Q. Isn't it very extraordinary, Mr. Fabian, that an inferior theatre like the Aldine that then wasn't even air-con-

ditioned, it was run down, could gross $117,000 playing an inferior picture like BWANA DEVIL?

A. It happened that this process, the novelty caught on for this one picture, but the process unfortunately did not sustain itself. I wish it had.

Q. In succeeding pictures it didn't prove to be—

A. That is right. The novelty did attract.

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(505)

Q. $117,396 is a pretty good gross, isn't it, Mr. Fabian?

A. Yes, it is.

Q. A very high gross, is it not?

A. It is a very good gross.

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(509)

Q. Now, you testified, Mr. Fabian, that one of the factors that was involved in selecting the Aldine for closing was that its location was inferior. That was in response to a question by Mr. Wolf. The location was inferior to your other theatres.

Would you say that its location was inferior to the location of the Boyd?

A. Not too much, but that is why we put Cinerama, a special kind of attraction, into the Boyd. We were afraid of it.

Q. Well, it couldn't be inferior to the Boyd if it is closer to the center of town, could it? I mean it is actually east of the Boyd, isn't it?

A. By a very small margin.

Q. But it is east, isn't it?

A. A very small margin.

Q. And the Mastbaum, you testified that you didn't consider its location inferior?

A. The Mastbaum?

Q. The Mastbaum.

A. The Mastbaum was on Market Street, considerably different than Chestnut Street in that particular area, in my opinion.

Q. Well, there are just as many movies on Chestnut Street

(510)

as there are on Market Street, aren't there?

Mr. Wolf: I object.

The Witness: Let me point out to you that it is considerably up in the shopping district.

By Mr. Sawyer:

Q. And the Mastbaum—

A. And I don't derogate the Chestnut Street locations where the shopping is, from, say, 16th down, or whatever it may be. But at 19th there is a considerable difference.

Q. Have you ever been out to 20th and Market where the Mastbaum was?

A. Many times.

Q. Was that a shopping district?

A. No, I didn't say that, but I said it is a better location than 20th and Chestnut or 19th and Chestnut.

Q. Do you think that 20th and Market is a better location west of 20th Street now, than the east side of 19th and Chestnut?

A. I do.

Q. Now, the Boyd actually, though, you say you took it out and put it on Cinerama. It has played a number of great pictures since then on regular runs, has it not?

A. Well, yes, it has been in what—we have tried to keep it as much as possible in what we call a hard ticket

(511)

road show policy.

Q. No, I am speaking of Cinerama, Mr. Fabian. The Boyd has played a number of important pictures which were not Cinerama since 1953, when Cinerama was installed, isn't that correct?

A. I say that they have been mostly hard ticket road show pictures.

Q. Hard ticket road show pictures?

A. Special attractions, yes.

Q. Let us take hard ticket road shows. Do other theatres of yours other than the Boyd play hard ticket road shows?

A. Oh, yes.

Q. And Mr. Goldman's theatres play hard ticket road show?

The Court: What is a hard ticket road show?

The Witness: Reserved seat. That is what I mean. It means that you buy a reserved ticket in advance.

The Court: You call it a hard ticket.

The Witness: I suppose I should not use those terms.

The Court: I was wondering what it was, because I did not understand.

By Mr. Sawyer:

Q. So that the playing of what the trade calls hard ticket road shows is generally true if the picture is so marketed

(512)

in downtown Philadelphia in first-run theatres, is that not so, sir?

A. You say other downtown theatres?

Q. In other downtown theatres, other than the Boyd?

A. Certainly.

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(514)

Q. Is it your testimony, Mr. Fabian, that someone in your organization invited the Viking to join in the split?

A. It so was reported to me.

Q. Who?

(515)

A. Mr. Bernie Brooks.

Q. Mr. Bernie Brooks?

A. Who was one of our film buyers here.

Q. And who authorized him to make this representation on behalf of Stanley Warner?

A. There was no authorization.

Q. And he wasn't authorized to do it?

A. No; not by me.

Q. He had no authority then to on behalf of Stanley Warners?

A. I say I never authorized him.

Q. Who could have authorized him, the Board of Directors?

A. No. His superior was Schlanger but I don't think Schlanger authorized him. I think it was a conversation that sprung up spontaneously.

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(540)

The Witness: I beg your pardon. The question that you asked me that the reporter just read, did we go to all of the picture companies; and my answer was no. That is correct.

The main thing that was arranged was the splits between Paramount and Warner's, which prior to that time had not been splitting; and those are the two companies that I referred to in my previous testimony and my present testimony, which is, did we go to all—did I go to all of the companies—is still correct, that I did not go to all of the companies.

By Mr. Sawyer:

Q. Which ones did you go to, Mr. Fabian?

A. I went to Paramount, as I told you, and I went to Warner Brothers.

Q. And will you tell me, sir, what you meant when you said on your deposition, "Well, I met individually with some of the film people"?

(541)

He met individually with them, if I recall, and I think we were at one meeting together with one of the companies.

Q. Which company was that?

A. I think it was Paramount.

Q. Don't you say there that you met with other film people?

A. Yes. I met with Warner's. Well, when I spoke to Mr. Kalmenson, I considered that a meeting, yes.

Q. Is it your testimony that you met with no others?

A. Well, I can definitely say that I did not talk to Metro, I did not talk to 20th Century Fox, I did not talk to RKO, Universal, United Artists.

I am uncertain as to whether I spoke to Columbia. That could be the only other one that I spoke to. None others did I speak to, other than Paramount and Warner.

Q. Well, didn't you say that you only did this with their knowledge?

A. Beg pardon?

Q. Didn't you testify in your deposition—

A. These arrangements had already been in effect with the other companies prior to my coming in in March of 1953, so that whatever the company had arranged prior thereto,

(542)

it was not necessary for me to arrange further.

Q. But when you said we only did this, you talked about you and Mrs. Goldman, didyou not?

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Q. The "we" that you speak of in your answer here, "It was only with their knowledge that we did this, refers to you and Mr. Goldman's arrangements, does it not?

A. Arrangements with Paramount and Warner's, yes.

Q. And when you said that you had to get the film companies to agree to it, you meant agree to the arrangement that you and Mr. Goldman had made, did you not?

A. I did.

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(547)

Q. Mr. Fabian, in response to a question put to you by Mr. Wolf, the question was as follows and your answer was as follows:

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> Q. As far as Mr. Goldman's arrangements with the companies that you have named in securing pictures that were on his side of the split, did you have anything to do with that?
>
> A. Nothing whatever. Whatever arrangements he made with the distributors were strictly his business.

Now, Mr. Fabian, I am just asking you, did you mean by that answer that there was any arrangement by Mr.

(548)

Goldman with any distributor or particular distributor with respect to pictures that were on his side of the split?

A. No. What I really meant was that he had to make his own contracts for his own pictures. That's what I assumed "arrangements" meant, the contracts for the actual playing of the pictures.

Q. Do you know of any particular arrangements that Mr. Goldman had with any one or more of the defendant distributors with respect to any particular features of their relations with him growing out of the split agreement?

A. No.

Q. Was any such particular arrangement discussed at your meeting with Paramount, at which Mr. Schwalberg was present?

A. There was no separate arrangement that either one of us discussed there.

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RE-CROSS-EXAMINATION

(552)

By the Court:

Q. In other words, you made a decision, as you said, Mr. Fabian—

A. That's right.

Q. —to sell the Aldine?

A. Correct.

Q. And my recollection is that you gave a reason, when in-

(553)

quired of it by Mr. Sawyer, and you were asked the same thing.

Why did you decide to sell the Aldine?

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(554)

A. I think I have already stated that before I came to the decision to sell the house I had examined the records.

(555)

Q. What did you find?

A. And that has already been stated and when I examined the records it is shown that for the two previous fiscal years ending September 1st it had lost in excess of $120,000; and that during the year in which I was examining the records, namely, the fiscal year of '53—

The Court: I am not interested in how much the loss—

By the Court:

Q. Were you making a profit or losing money?

A. We were losing money, Your Honor.

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(558)

NAT FELLMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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(559)

By Mr. Sawyer:

Q. By whom are you employed, Mr. Fellman?

A. I am employed by the Stanley Warner Management Corporation.

Q. How long have you been employed by them?

A. Since March, 1953.

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(560)

Q. Now who was the General Manager in 1953?

A. Mr. Harry Kalmine.

(561)

Q. Did he put you in charge of handling the split for Stanley Warner?

A. He asked me to handle the mechanics of the split, yes, sir.

Q. Now, what instructions did you receive from Mr. Kalmine?

A. Mr. Kalmine asked me to handle the mechanics of splitting the Paramount pictures and the Warner Brothers pictures subject to the understanding that every exhibitor who wished to play first-run pictures in Philadelphia would have the same opportunity.

• • •

Q. Now what were your instructions from Mr. Kalmine regarding how the split should be made? How were you to do it?

A. Mr. Kalmine advised me that there was to be an equal split, but he told me at all times that these pictures were subject to every other theatre in Philadelphia who wished to play first-run having an equal opportunity to negotiate or bid for such pictures.

Q. Well, you were with an exhibitor, weren't you, sir? You were connected with an exhibitor?

A. An exhibitor, yes.

Q. So whether or not they had such an opportunity wouldn't be something that you, as an exhibitor, as Stanley Warner, would decide, would it?

A. No, but at the same time—

May I answer that question?

Q. Yes.

A. At the same time he made it clear to me that the fact that pictures were on our split or on Goldman's split would not mean that we would play such pictures; that we would have the opportunity to purchase those pictures in the same manner as any other theatre.

Q. You wouldn't have an opportunity to purchase them in the same manner as any Goldman Theatre; he didn't mention that, did he?

(563)

A. I am talking about the pictures on our split.

Q. On your side of the split?

Did he explain to you that you never had to be concerned that any pictures on your side of the split would be sought by Mr. Goldman's theatres?

A. Yes.

Q. Did he say anything about whether the product of Twentieth Century-Fox was to be split?

A. No. He didn't mention Twentieth Century-Fox.

Q. He didn't tell you that it was not to include Fox?

A. No, sir.

Q. Did the split, in fact, include the products of Twentieth Century-Fox?

A. You were talking about the instructions from Mr. Kalmine.

Q. I was at first; you answered that. Now I ask you a different question—did you, in fact, when you came down to make the split, include in the split the product of Twentieth Century-Fox?

A. No, sir.

Q. How did you know not to?

A. Fox pictures generally played the Fox Theatre.

Q. How did you know not to include the product of Twentieth Century-Fox in the split, of your boss, Mr. Kalmine, didn't tell you?

(564)

A. (There was no response.)

Q. How would you know that?

A. Mr. Kalmine did not tell me to split each company's pictures.

Q. He didn't?

A. He asked me to split, to handle the mechanics of the split that we got from Paramount and Warner Brothers Pictures.

Q. Very well, Mr. Fellman.

You came down to Philadelphia, you were under instructions from Mr. Kalmine, you mentioned splitting the product of Columbia, did you?

A. I found when I came to Philadelphia and discussed the various companies other than Paramount and Warner Brothers, that there was no uniformity in the methods of handling and selling their pictures.

Q. Thank you, sir. Now would you answer my question?

Did you split the product of Columbia?

A. When I first came to Philadelphia, I did not split the products of Columbia.

Q. You did not?

A. Not—

Q. You did not?

A. Not at the first time I came to Philadelphia.

(565)

Q. When did you start splitting Columbia's product?

A. I found that the Columbia product was being marketed by their sales people in a fashion that they would designate—

Q. I don't mean to interrupt you, Mr. Fellman, but can you answer my question? When did you start splitting Columbia's product?

A. I am trying to answer your question.

Q. All right. You are confused.

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(566)

By the Court:

Q. Did you split Columbia's product and, if so, when?

A. I believe about six months after I first came to Philadelphia I split some Columbia pictures.

By Mr. Sawyer:

Q. Did you split the pictures of Universal?

A. I believe the same answer would apply, Mr. Sawyer, that on my first visit to Philadelphia Universal was selling

their pictures in a manner that they selected to the exhibitor they selected, and that it wasn't until some several months later that I first arranged to split with Universal, understanding and again subject to other theatres having an

(567)

equal opportunity to negotiate or bid for such pictures.

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(569)

Q. Did you split the product of Loew's when you first came to Philadelphia?

A. Yes, I split the product of Loew's, and when I came to Philadelphia I was told the product of Loew's was being split since 1951 at the request of Metro.

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Q. And United Artists, did you split the product of United Artists when you first came to Philadelphia?

A. United Artists handled their own splits.

Q. They split it themselves, did they?

A. Yes.

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(570)

Q. Now, Mr. Fellman, do I understand that when you came to Philadelphia you did not make any split of 20th Century Fox product?

A. Yes.

Q. Did you ever make any split of 20th Century Fox product?

(571)

A. No, sir.

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The Court:

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I will ask the question.

Why didn't you split the Fox pictures?

The Witness: Your Honor, I used my business judgment. The Fox pictures were generally playing the Fox Theatre, and if I sought to license some Fox pictures it would naturally create a void in the Fox Theatre, and they in turn would seek other product, and the end result would be of no benefit to my company.

(572)

The Court: Why?

The Witness: It would just be a question of trading pictures.

The Court: In other words, as I understand your thought, if you took some of the Fox pictures you thought they in turn would take some of the other pictures from some of the distributors where you were getting the pictures?

The Witness: That is true.

The Court: Proceed, Mr. Sawyer.

By Mr. Sawyer:

Q. And was this a decision that you reached upon your own, Mr. Fellman?

A. Yes.

Q. And this was not an instruction that you received from your company?

A. No, sir.

Q. Did you make any decisions with respect to other distributors whether or not you would seek to split with them or not on your own?

A. No, sir.

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(574)

The Court:

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Now, did you get any instructions, Mr. Fellman, from your superior, to split the Warner product?

The Witness: Yes, sir.

The Court: Paramount product?

The Witness: Yes, sir.

The Court: Columbia?

The Witness: No, sir.

The Court: Universal?

The Witness: No, sir.

The Court: Loew's?

The Witness: That product was already being split.

(575)

The Court: Fox?

The Witness: No, sir.

• • •

By Mr. Sawyer:

Q. You testified in New York on depositions, Mr. Fellman, on April 29, 1959, in this case, is that correct, sir?

A. Yes, sir.

Q. At Page 8—no, Pages 8 and 9. And I will ask you, Mr. Fellman, if you were asked these questions, and did you give these answers?

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(576)

Q. How did you know what to do in handling the mechanics of the split?

A. Well, I was advised by Mr. Kalmine that it was to be an equal split, and having had experience in splitting product and discussing the splits in many situations I used my own judgment.

Q. Did he tell you that it was to be an equal split of the product of all the distributors?

A. I believe so.

Q. That would include, would it not, Paramount?

A. When you say "all the distributors," "all" would include Paramount. I don't exactly recall

(577)

whether the Paramount understanding had been reached at the commencement of my splitting pictures with Mr. Goldman.

Q. And it would include Warner Brothers after that split had been set up, would it not?

A. It would include. It did not include the Fox.

Q. It did not include the Fox, you say?

A. No.

Mr. Goffman: Not "The Fox." You are reading it wrong, Mr. Sawyer.

By Mr. Sawyer:

Q. (Continuing)

Q. It did not include Fox, you say?

A. No.

Q. It did include Columbia?

A. It did include Columbia.

Q. And Universal?

A. Yes.

Q. And Loew's?

A. Yes.
Q. And RKO?
A. Yes.

(578)

Were you asked those questions and did you give those answers?
A. I did give them.

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(583)

Mr. Sawyer (continuing):
Q. How did you know what to do in handling the mechanics of the split?
A. Well, I was advised by Mr. Kalmine that there was to be an equal split and having had experience in splitting product and discussing the splits in many situations I used my own judgment.
Did he tell you that it was to be an equal split of all the product of all the distributors?
A. I believe so.
Q. That would include, would it not, Paramount?
A. When you say "all the distributors," "all" would include Paramount. I don't exactly remember whether the Paramount understanding had been reached at the commencement of my studying pictures with Mr. Goldman.
Q. And it would include Warner Brothers after that split had been set up, would it not?
A. It would include. It did not include Fox.
Q. It did not include Fox, you say?

(584)

A. No.
Q. It did include Columbia?
A. It did include Columbia.

Q. And Universal?

A. Yes.

Q. And Loew's?

A. Yes.

Q. And RKO?

A. Yes.

Q. And United Artists?

A. Yes. I believe with regard to United Artists that this company made up the splits themselves and—

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(607)

Q. Now, suppose there had been a split made assigning the pictures to either yourself, to Stanley Warner, excuse me, or to the Goldman chain; and suppose Mr. Goldman were in dire need of a picture that was on your side of the split,

(608)

would you ever give him a picture on your side of the split and put it over on to his side?

A. There were some rare occasions where there were circumstances that I would like to explain, if I may.

Q. Yes, indeed. What were the circumstances?

A. There was a situation with Paramount. Paramount, as you understand, made the splits themselves. By that I mean they set up the pictures for the Goldman side or the Stanley Warner side, subject to any and all other exhibitors having an equal opportunity to contract, by negotiation or otherwise, or bids, for the purchase.

I believe it was the latter part of '54, where COUNTRY GIRL was designated by Paramount on our side, on the Stanley Warner side of the split. Of course, this did not mean that we would get the picture unless we won the picture competitively or negotiated successfully.

It was about this time that Mr. Goldman and Mr. Beattie complained to me that the splits were not equal. At the same time Paramount was looking for a specific date for this picture, which was up for an Academy Award and, as I understand it, the picture was to receive national publicity by means of television at that time the Academy's nominations were televised.

(609)

We had some bookings in our theatres at the time and with Mr. Goldman stating that his opinion was that the splits were unequal, I agreed that if Paramount, who was making the split, put the picture on the Goldman side it was all right with me. Of course, it would then be subject to every other theatre having the same opportunity as if it was on our split.

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(618)

Q. Now, Mr. Fellman, again in your deposition, page 40, do you recall being asked about whether or not WHITE CHRISTMAS was a picture shifted from your side of the split to the Goldman side of the split?

(619)

A. I am not clear on that, sir.

Q. On page 40, Mr. Fellman, I will read you the question and the answer.

A. Yes.

Q. By Mr. Fine:

Q. Let me show you an exhibit that has been previously marked, or a copy of it, as P-37, in these depositions, covering Paramount pictures, and ask you if you personally remember splitting any of those?

A. I recall splitting most of these. Some of the titles I don't recall as to the picture being available as to the time I was splitting pictures, but if they were available I probably arranged for these splits.

Q. Do you have any idea why those three that were shifted over from the Stanley Warner side to the Goldman side, BRIDGES AT TOKO-RI, COUNTRY GIRL, and WHITE CHRISTMAS were shifted?

A. As I recollect, my opinion is that the Stanley Warner theatres had other pictures available at the time or were booked up, and in these instances the Goldman theatres were in dire need of a particular picture and for that reason I agreed to move the picture

(620)

from split to the other, from one side of the split to the other.

Does that refresh your recollection with respect to WHITE CHRISTMAS as being one of those pictures?

A. I recollect my answer, Mr. Sawyer, but I since have discussed these pictures with our local Philadelphia people and they tell me their records show that WHITE CHRISTMAS was on the Goldman split.

The record that you—not you, but I believe it was Mr. Fine, who asked me at the time, showed WHITE CHRISTMAS under the Stanley Warner split moved to the Goldman split.

Q. That record was a Paramount record, wasn't it?

A. I don't know.

Q. That he showed you?

A. But according to the information I received from my office, I was told that WHITE CHRISTMAS was on the Goldman split.

Q. And how about BRIDGES AT TOKO-RI?

A. The BRIDGES AT TOKO-RI was one of the pictures that Paramount agreed—Paramount put it on the Goldman split after taking it off the Stanley Warner split.

Q. And is that one of the examples of a case where Stanley

(621)

Warner had other pictures available at the time and were booked up?

A. Stanley Warner may have been booked at the time.

Q. Now did Goldman, when the situation was the other way around, ever give Stanley Warner pictures that were on his side of the split?

A. I don't recall offhand.

Q. Didn't he transfer over HELL'S ISLAND?

A. He may have. He may have, but he would have to do it—

Is that a Paramount picture, sir?

Q. Yes, it was a Paramount picture.

A. He would have to do it with the the distributor's approval, and subject to everybody else having the same opportunity to purchase it as we had.

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(639)

FIFTH DAY

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(641)

NAT FELLMAN, resumed.

DIRECT EXAMINATION (continued)

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By Mr. Sawyer:

Q. Mr. Fellman, in the course of your duties in relation to handling the mechanics of this split do you frequently meet with Mr. Goldman to carry out those duties?

A. I met with Mr. Goldman and with Mr. Beattie.

Q. Mr. Beattie? Who is Mr. Beattie, Mr. Fellman?

A. Mr. Beattie is employed by Mr. Goldman.

Q. Where would these meetings take place?

A. The majority of times they took place in the Goldman Theatre Building.

Q. Here in Philadelphia?

A. Yes.

Q. Where is that?

A. I don't know. I am not a Philadelphian and I am sorry, I do not know the exact location.

Q. When you sat down then to split the pictures did you have

(642)

information in your possession as to what pictures were going to come out?

A. Generally, yes.

Q. Well, you would have to, I suppose, or you couldn't split the pictures unless you knew what was going to be released.

A. That is right.

Q. How did you get that information?

A. From various means, sir. In some instances, in the case of Metro, for example, the local Metro manager would write to our Philadelphia office, and I presume also to the Goldman office, and list a group of pictures that they requested be split.

In other cases the sales manager or someone connected in the sales department of that particular company would give each of us a list of pictures.

In other instances the company did the splitting themselves and advised us which pictures they would put on the Goldman split and which pictures they would put on the Stanley split.

I don't want to be repetitious, Mr. Sawyer. You cautioned me yesterday about saying that these were all subject to other theaters having the same opportunity—

Q. I say that again, Mr. Fellman.

A. —and if you don't wish me to repeat it I will refrain

(643)

from saying so.

Q. If you would like to say it again, Mr. Fellman, go ahead.

Mr. Wolf: May it please the Court—

The Court: Proceed. Ask another question.

By Mr. Sawyer:

Q. Mr. Fellman, in the case of the pictures of those companies where the split was left to you and Mr. Goldman and not done by the company did you make any notation then as to what you agreed upon, who was going to have the picture on their side of the split?

A. Definitely, sir.

Q. What kind of a notation would that be?

A. It would be a pencil notation.

Q. Did you preserve those notes or memoranda?

A. I will answer this way, Mr. Sawyer. I was in Philadelphia in most instances when they splits were made.

Q. Yes?

A. And I went to our Philadelphia office and advised them from those notations of the splits.

Q. Who would you advise there?

A. Generally our film buyer, I talked to Mr. Minsky.

Q. Well, I just asked you did you preserve those notations?

A. I took those notations back to New York and kept a record.

Q. Is that the book that you spoke of as having been

(644)

subsequently destroyed?

A. Yes, sir.

Q. Do you remember when it was destroyed, Mr. Fellman?

A. I handled the mechanics for about one and a half years, which means that I handled it up until about the end of 1954, and it served no purpose to cluttered my files with such information, the information was already in our Philadelphia office, and it was sometime after the end of 1954 that these records were no longer in my possession.

Q. Do you know how long after the end of 1954?

A. It might have been a month, or might have been two months. I don't recall exactly.

Q. Did your company make up their own form of release schedule for the motion pictures about to be released by all the different distributors?

A. Yes, we get release schedules from all distributors. To get a clear picture of releases from all companies and to see how they match up we make a composite of such releases.

Q. And would you furnish that to Mr. Beattie, so that you could both have that sheet, so you could work with it?

A. I would furnish it to Mr. Beattie or anyone else who asked for it.

Q. Well, did anyone else ever ask for it?

A. Definitely, sir.

(645)

Q. Who would ask for it? Who might ask for it? Who did ask for it?

A. There were people over the country who asked for it. We sent to each of our zone offices, and many competitors like the form. It has the concise data as to releases from all companies.

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Q. Now, Mr. Fellman, again, what is your job at this time? You were head of film buying for Stanley Warner, were you, sir?

(646)

A. Well, personally I am the executive assistant to the general manager.

Q. Yes?

A. And I particularly get into all film matters.

Q. I didn't quite hear you. You dropped your voice a little bit. Would you mind repeating?

A. I say I get into all film matters concerning our company's business.

Q. Were you the senior person in your company, the senior film buyer in the Stanley Warner organization at that time?

A. I was the head of what we might call the film department.

Q. The head of the film department? In your judgment as head of the film department what is the most important single factor in the ability to make a big gross on a motion picture showing?

A. Well, the big factor is to get a big important picture.

Q. Do you recall the picture TEN COMMANDMENTS, Mr. Fellman?

A. Yes.

Q. Was that a very long picture in playing time?

A. Yes.

Q. And was Stanley Warner able to play that picture successfully in small theaters in different parts of the country?

A. The picture was successful in all theaters.

Q. And that includes small ones?

(647)

A. Includes some small ones; if the theater had a larger seating capacity it would have been more successful.

Q. Do you know where that picture played first run Philadelphia?

A. I believe it was the Randolph.

Q. Now, at any time, if you know, during your handling of the split did Fox Philadelphia bid on any of the pictures that you and Mr. Goldman had split?

A. I do not now know, sir.

Q. You do not know whether they did or not?

A. I do not know.

(648)

Q. Were you aware that National Theatres owned Fox Philadelphia?

A. Yes, sir.

Q. Did you ever have discussions with Mr. Bert Pirosh of National Theatres?

A. With relation to what, sir.

• • •

Q. Did you ever talk business with him?

A. We had no—no, sir, not talk business.

Q. You did not.

A. No, sir.

Q. Where did you meet him, Mr. Fellman? Where was it?

A. I may have met him in California; I am not sure.

Q. And you did not at that time talk anything about the process of selling films or booking them first-run Philadelphia?

A. No, sir.

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(652)

Q.

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Now did you ever hear, when you were down splitting the pictures with Mr. Goldman, of an arrangement that Mr. Goldman claimed he had with Mr. Schwalberg of Paramount?

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(653)

The Witness: I was not familiar with any arrangement that Mr. Goldberg—Mr. Goldman had with Mr. Schwalberg.

By Mr. Sawyer:

Q. Did you ever hear about it?

A. There was some mention at one time about—

Q. Excuse me. Go ahead.

A. —Mr. Schwalberg, but it never go across to me and I have no recollection as to anything specific.

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(654)

The Court: Now this is an agreement or an alleged agreement between Mr. Goldman and this man at Paramount?

Mr. Sawyer: Mr. Schwalberg, yes, sir.

The Court: Was Stanley Warner part of this agreement? Were they in this arrangement?

Mr. Sawyer: I don't know, Your Honor.

(655)

By Mr. Sawyer:

Q. From whom did you hear about any such agreement?

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The Witness: I did not hear of any Schwalberg agreement.

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(657)

The Court: No. He is asking you, you know something about it and it never got through to you and you know nothing specific. The question now is with whom did you discuss it or how did you know even the frag-

ment of something existing, whether you knew that it existed or not, if you recall?

The Witness: I am very vague about this, Mr. Sawyer.

Mr. Sawyer: Yes.

The Witness: I stated before that I heard some mention from Mr. Goldman of the word "Schwalberg," the name Schwalberg; but I know of no understanding that he had with him.

By Mr. Sawyer:

Q. Whatever you learned about it, it did come from Mr. Goldman; is that correct?

A. That's right.

(658)

Q. Now when you say the name Schwalberg, of course, the name Schwalberg was familiar to you anyway, wasn't it? You knew who Mr. Schwalberg was?

A. Yes, sir.

Q. Were you at the meeting with Mr. Schwalberg of Paramount that Mr. Fabian testified about here yesterday?

A. No, sir.

Did you find out from Mr. Goldm hat the discussion that he had with Mr. Schwalberg, wha.ever it was, concerned what would happen about negotiating for pictures after bids were rejected? Did you find out that much about the agreement?

A. No, sir.

Q. You did not?

A. No, sir.

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(659)

Q. Now, Mr. Fellman, I would like to read you this and see if it refreshes your recollection about the general subject of this agreement, if there was one:

Q. Were you told at any time that there was an agreement made between Goldman and Mr. Schwalberg of Paramount in 1953?

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(660)

Q.

A. I heard some mention of some discussion that Goldman claimed he had with Schwalberg. I don't recall the exact content of that discussion or much about it.

Q. Will you tell me in substance everything you do recall?

A. I know so little about it that—

Q. Well, every little helps. Do you want to tell me what it was?

A. At one meeting with Mr. Goldman he made some mention of a discussion with Mr. Schwalberg. I don't recall what is was all about.

Q. Was it on the general subject of that long question I sked you about negotiating for pictures after bids?

A. It was on the general question, yes.

Mr. Goffman: Read the next question and answer.

By Mr. Sawyer:

Q.

Q. Is the substance of my question a correct statement of the arrangement he said he had with Schwalberg?

(661)

A. I don't know.

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(662)

CROSS-EXAMINATION

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(665)

By Mr. Ward:

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Q. Now, you have testified in response to questions put to you with respect to the varying methods of making motion picture films vailable to your company and to the Goldman Company throughout your testimony. Will you state to his Honor and this jury whether, under those arrangements that you have outlined and explained, the Viking Theatre during the period with which we are concerned here was free at all times to compete with you and the Goldman Theatres for the licensing of every picture released for exhibition in downtown Philadelphia?

A. Unquestionably they had every opportunity to license any picture.

Q. Further, with respect to the subject of the availability of the product of the several distributors to your company and to the Goldman Theatre Company, will you state, first, whether your company got all the pictures on your side of the split, as it has been referred to here.

A. We definitely did not receive all the pictures on our side of the split. In fact, Viking Theatre, as I recall, during the period that I handled the mechanics of the split, were playing most of the Metro pictures.

Q. By Metro, you mean Metro-Goldwyn-Mayer, sometimes called Loew's, Inc.?

(667)

A. Metro-Goldwyn-Mayer at that time was probably the outstanding company in the business.

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Q. One final question, Mr. Fellman, so we may have this clearly upon the record.

Will you state, please, whether anything involved in the arrangements that you have described with relation to the division of motion picture film product, as you have explained it, was intended by you or your company in

(668)

any way or whether it had for its purpose injuring the Viking Theatre?

A. In the first place, the Viking Theatre was not in existence when I started the mechanics of handling these splits, and at the time it did come in existence there was no intention, and the facts prove that the Viking had every opportunity to license any picture on either split.

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(670)

RE-DIRECT EXAMINATION

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(709)

Mr. Sawyer:

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(710)

I don't think it is absolutely, Your Honor, something which is totally vital to my case as to what Your Honor decides in this, and it is in Your Honor's discretion.

(711)

I do think this, Your Honor, that the idea that it would shorten the trial I can't follow. Why would it shorten the trial whether we put on Mr. Minsky now or Mr. Minsky later? It is not going to shorten it.

The Court: Except, you see, Mr. Sawyer, you said something to me that I didn't know. You say out of the 37 pictures that you got there were only two adjustments, Stanley Warner and Goldman got 150 maybe out

of how many, say 300 pictures. Well, 50 per cent as opposed to 2 per cent or 3 per cent, that is something that I ought to consider so far as the relevancy.

Mr. Sawyer: But can't you hear them now when we are on our side of the case and we are showing that we didn't get adjustments the welkin would ring with cries "Well, you don't show that we ever got any adjustments." One has got to come first.

It will happen, Your Honor, we will get into it and they will say this is incompetent because it isn't anywhere shown on the record that others weren't treated the same way, and so on. Either way you are going to hear it.

The Court: Of course, the difference is that the burden is on you.

Mr. Sawyer: Well, I am speaking about shortening it, you see. Normally, I would have the discretion
(712)
as to the order to which I am put. This is the general rule. Your Honor has the discretion, but my point is it isn't going to shorten it in that sense and it isn't going to help too much, I don't think, Your Honor.

There are some advantages to me—I can see it either way—there are some advantages to me to do it the other way. We have made certain statistical studies which I don't think were particularly contemplated when the case was in other hands, and in many ways it might be clearer to get that in first. I don't think, however, Your Honor, that it has anything to do with shortening it because Mr. Minsky takes a certain length of time or he doesn't.

The Court: No, I agree with you, it doesn't shorten the case.

Mr. Sawyer: You think it might make it clearer.

The Court: Unless it gets to the point where I am persuaded that you have not proven anything. However, I have not reached that point yet. I could.

Mr. Sawyer: We have got still an opportunity afterwards to prove it through their witnesses entirely.

The Court: Absolutely.

Mr. Sawyer: We can prove the whole case without ever putting these people on the stand.

(713)

The Court: I agree 100 per cent.

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(737)

SIXTH DAY

(IN CHAMBERS)

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(760)

Mr. Nizer: We would not propose in the fourth inning that the ninth-inning score be posted up. I think we agree fully with that, but I don't think that is a problem now. It seems to me, if I may add just one word to what Mr. Ward has said, that all of this is argument around the point that does not exist.

Your Honor never ordered that Mr. Sley would go on first. As a matter of fact, I asked in court whether

(761)

Mr. Wren would take the stand first, I just wanted to know the sequence, and he told me Mr. Sley would. Well, that is all right.

Sley covers a period of roughly seven months in this theater, and that is on hearsay to a certain extent, because he testified that Comer and Manning, his managers, told him what had happened in the field when they went out. Wren covers a period of two years.

Very well then, let Wren take the stand. By the time he is through with his story and cross-examination we hape that Mr. Sley will have good news from his brother and be available, and that is all there is to it.

We are not asking for any change in the order in any way, and there is no emergency that requires a change, and I don't understand what this all about.

Mr. Sawyer: Let me correct the facts, Your Honor.

The fact is that they both cover almost an exactly equal period, if that makes a difference, because this story starts, of course, in June of 1953. Therefore you go 18 months until Wren comes, and from Wren to the end of the damage period is another 18 months. They cover equal periods.

If what Your Honor says is so, and I think it would be a highly extraordinary situation where any court has done otherwise, namely, that even at the end of their testimony

(762)

I have still the other five innings to go, as you say, if that be so, then I come back to the point, if that be so, what difference does it make whether they go on now or not?

The Court: Well, simply this, Mr. Sawyer: as I said, ordinarily the principals come on the stand. It gives a better direction, in my judgment, to a case. It informs me better as to what the contention of the plaintiff is. Of course, you stated it in the opening, but I want to hear it from the principals' lips on the witness stand too.

Mr. Sawyer: Let me just say this, Your Honor: it seemed to me there was just enough merit to that concept of Your Honor's, from my standpoint, my interest as a plaintiff, to feel that although one has, particularly under the circumstances in which I have this case, some

misgiving about switching things around, in something which I had to prepare perhaps a little bit more by rote than you would if you had lived with it—but I thought there was enough merit to that to have thought to myself that perhaps had I had it to do in the first place I might have well put them on first anyway. Although it is a close case and my judgment was that it was better the way it was.

But you see, now there is a good reason for not doing it, because the advantage which Your Honor sees, and I see it too, you know, you start out in the beginning: (763)

What is the story here? Well, we bought this theater, and this happened and that happened. Now, that does make it I think helpful to you and to the jury probably, to say what the whole thing is, but, you see, we have lost that now, because that we cannot have because of this unfortunate situation with Mr. Sley. So that we are not going to get the benefit of that in this case. There is some benefit to it. As a matter of fact, I think it is a benefit to me. There was some mitigation in this change because it would have enabled me to start out with Mr. Sley and take him right through the thing, and where he stops Wren takes over, and when you are finished you say: Now, that is the story. And then we go behind the scenes for certain points.

It might result either way in certain stipulations, for instance, as far as the time of this trial goes. All this came up, if Your Honor will remember, and the particular juncture was it drifted into this point. I mean I understand they had a right to do on Friday, but it drifted in from this question of Mr. Minsky who was going to testify about a number of adjustments.

Well, now, if the problem is hard, and I agree in time, we can save acres of time by stipulation, Your Honor, acres and acres of time.

Now, I am giving away something there because,
(764)
as we all know, you can stipulate your case into insensibility, you can stipulate it out of any impact on the jury.

I would rather take the Stanley Warner witness and show him the contracts involved and the adjustment forms, to bring it home, but in the interest of saving time, all of this material is derived from the defendants' records, most of which you will have in these tabulations which you will get this afternoon came from answers to interrogatories, but in some cases, and namely Stanley Warner, they declined to answer the interrogatories on the ground, and Your Honor supported them, that we had the information, and we could make our own computations, so to speak, make our own tabulations from it. But if that is the problem, which is a matter of shortening things, this can be done, and I mean I think we could sit down and stipulate this and it could go into the jury in 20 minutes, this stuff.

The Court: First of all, I concluded I think that you ought to call Mr. Wren tomorrow morning.

How long do you think you will have Mr. Wren in direct examination?

Mr. Sawyer: Your Honor has now ruled?

The Court: Yes, I have ruled. The ruling is no different from what I ruled last Friday.

Mr. Sawyer: Well, I just hope it is clear on
(765)
the record, Your Honor, with all due respect to your ruling, that I take an exception.

I think Your Honor's ruling is a substantial handicap to the plaintiff and I accept it only because, of course, I must accept it, and I except on further argument.

The Court: For the purpose of the record, I do not think that it is substantial injustice to the plaintiff. The plaintiff was warned last Friday a week ago that the application so far as Mr. Sley and Mr. Wren being put on the stand could be renewed in a week, which week expired last Friday, it was renewed, and I gave you an extra day. I said initially that if I directed you to call Mr. Sley I would have him called on Tuesday and that is, of course, adhered to.

Now Mr. Sley's brother is ill. I do not think that affects the situation in any way because we have Mr. Wren available. He was prepared or should have been prepared.

Mr. Sawyer: That is not the difficulty with this point now, that is not what troubles me.

The Court: I do not see that that is substantial injustice at all.

Mr. Sawyer: Well, I just don't feel, Your Honor, that a plaintiff who has a story to tell, and I have to persist in this, Your Honor, but this to me—I didn't use the word "injustice," Your Honor, I wouldn't characterize

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(Your Honor's rulings in that way. I said it is a substantial handicap to the plaintiff, and I think it is a substantial handicap, and the advantage to be gained, Your Honor, if you will indulge me in persisting in this, is one in which, and I think we might have enjoyed this advantage, Your Honor and the jury get the benefit at the outset of a chronology of events, of a history, of a story, if you will, and this will be destroyed in large measure because the story will come in, first the end of the story, and then at some future time the beginning of the story.

Secondly, the testimony of Mr. Wren I think will be fairly long and the cross-examination may be even more prolonged, it is uncertain about that, and I am losing what I would also hope to have, to mitigate the effects upon Mr. Sley in his upset condition, namely, a substantial amount of time between either his brother's recovery or his brother's death and the time that he must take the stand.

I am not familiar with this, but I have an understanding, and maybe the people here can tell me, that in the Conservative Jewish religion there is a period fairly prolonged in which you are not supposed to go out or do anything after the death of a brother. We may get three or four days or five days from now and the brother may die then, and we will be confronted again with the dilemma of Mr. Sley

(767)

because by that time he will be coming up.

I understand Your Honor's ruling to be to put Mr. Wren in, which would mean Mr. Wren and Mr. Sley, but to put Mr. Wren on first. I do not take it to mean to put Mr. Wren on now and then go back and put Mr. Sley on at the end.

The Court: No, my ruling is—

Mr. Sawyer: I will not persist, Your Honor. I have expressed the thought.

The Court: You have an exception, Mr. Sawyer.

Mr. Sawyer: Yes, I understand.

The Court: My ruling is to put Mr. Wren on tomorrow morning, Tuesday, at 10:00 o'clock.

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(788)

SEVENTH DAY

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(806)

The Court: Proceed, Mr. Sawyer.

Mr. Sawyer: Mr. Jay Wren.

JAY WREN, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Wren, by whom are you employed?

A. The Viking Theatre Corporation.

Q. In what capacity were you employed there, if you were, in 1954-1955 and 1956?

A. General Manager.

Q. When did you first commence working for the Viking Theatre?

A. The early part of February of 1955.

Q. What was the actual date on which you commenced your employment under your contract?

A. March 1, 1955.

Q. Who hired you to work with the Viking Theatre?

A. Mr. Harry Sley.

Q. At that time were you employed elsewhere and, if so, where?

A. Yes, I was employed by Paramount Pictures Theatre Corporation, a subsidiary of American Broadcasting-Paramount Pictures—Paramount Theatres.

(807)

Q. Is that connected with the defendant firm here?

A. No, it is not.

Q. What sort of a company is that?

A. Motion picture exhibition and radio and TV.

Q. What did you do with Paramount Exhibition Corporation?

A. I was a District Manager in charge of the Philadelphia Nixon and Roosevelt Theatres, and the Upper Darby Tower Theatre.

Q. What were your duties in connection with that position?

A. I was charged with the general management of the three theatres as well as film buying.

Q. When did you first come into the motion picture exhibition business?

A. Either early or late 1931 or 1932 as a doorman at the RKO Mayfair Theatre on Broadway in New York City.

Q. How long did you have that job, Mr. Wren?

A. Oh, a matter of a couple of months.

Q. Then what did you do?

A. I was sent to the Palace Theatre on Broadway at 47th Street as assistant to a Mr. Fred Crews and I was in charge of the vaudeville.

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(808)

Q. How old were you then, Mr. Wren?

A. 21.

Q. How long did you remain in that position?

A. Until about 1933, when Mr. Walter Reade reacquired the RKO Mayfair from RKO.

Q. At that time where did you go?

A. I went back to the Mayfair Theatre as one of the assistant managers under Mr. Leo Justin, a partner of Mr. Walter Reade's.

Q. Then what was your next position, Mr. Wren?

A. Mr. Reade reacquired the Astor Theatre on Broadway and I went to the Astor Theatre as House Manager.

Q. And then?

A. I was sent by the Walter Reade Theatres to Long Branch, New Jersey, to refurbish and relight a theatre known as the Strand Theatre.

I was at the Strand Theatre in Long Branch, New Jersey, for a matter of five or six weeks, when I was sent to the Walter Reade St. James Theatre in Asbury Park, a new theatre, and after a matter of a few months I was sent to the Paramount Theatre in Asbury Park, a Walter Reade Theatre, in charge of the Paramount Theatre, the Convention Hall, with

(809)

ligitimate shows, meaning No. 2 road companies, and the Casino, a name band operation.

Q. Then what was your next association?

A. In 1937 I was sent to complete construction of a community theatre in Morristown, New Jersey, for the Walter Reade Theatres we opened the house late in December, and in May or June of that year, 1938, I was sent to New York in charge of advertising and publicity for the Walter Reade Theatres, and as assistant to Mr. Reade.

Q. You mean you were in charge of advertising and publicity for that whole chain?

A. For the entire circuit.

Q. How long did you stay in that job, sir?

A. From 1938 to late in 1941 or 1942, at which time I joined the Paramount outlet known as Essex Amusement Corporation, a subsidiary of United-Paramount Theatres in Newark, New Jersey, which operated the U.S. Theatre in Paterson, the Adams Theatre in Newark, New Jersey, and the Paramount Theatre in Newark, New Jersey.

Q. What were your duties in that position?

A. I was in charge of advertising and publicity and later assisted Mr. Adams and Mr. Griefer in the purchase of films, which I might add was no arduous task because at that time

(810)

the Paramount outlets in Newark only had Republic and Paramount pictures.

Q. What theatres did you buy films for when you had that position?

A. You mean in Newark, New Jersey?

Q. The one you are now speaking about.

A. I just assisted Mr. Adams and Mr. Griefer, who was the General Manager for United-Paramount Theatres.

Q. How long did you remain in that position with Mr. Adams?

A. From 1942, just about ten years, to 1952, in February, Paramount sent me to Philadelphia.

Q. You say Paramount again, Mr. Wren, you mean this—

A. American Broadcasting-Paramount Theatres.

(811)

Q. At the Tower, Nixon and Roosevelt, is that the position you had when you joined the Viking Theatre?

A. That's right.

Q. When you first took up your duties at the Viking Theatre, would you tell us generally and briefly what your duties consisted of at that time?

A. Well, the management and full operation of the Viking Theatre, as well as the Locust Theatre on 52nd Street in West Philadelphia, and the purchasing of film and supplies.

Q. What was the first task you undertook on behalf of the Viking?

A. Well, with the full knowledge of Paramount—American Broadcasting Paramount Theatre early in February, I contacted—Warner Bros., rather, advised me that they had a picture known as EAST OF EDEN which was available.

Q. Very well. Just a moment.

Now, Your Honor, I will read Warner's request for admission and Admission No. 6(a), sir, with respect to the picture EAST OF EDEN:

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(812)

On Monday, November 8, 1954, at 2:00 P.M.—

• • •

your Philadelphia branch manager, Charles Belian, together with your Philadelphia district manager, William G. Mansell, visited Herman Comer at the Viking Theatre and were advised that Comer was unable to buy SILVER CHALICE and YOUNG AT HEART for the Viking Theatre because he had a five week's commitment on THE LAST TIME I SAW PARIS, which was scheduled to open on either December 15 or December 22, 1954. Beilan and Mansell also,

(813)

among other things, discussed EAST OF EDEN on a March availability, and Comer advised them he would keep it in mind.

The answer is:

Admitted.

• • •

Q. Will you proceed, Mr. Wren, with your EAST OF EDEN?

A. Mr. Beilan advised me the picture was available for screening. I screened the picture and contacted them to tell them that I was interested in the picture. We had a discussion with reference to the picture, and I was told both by Mr. Mansell and Mr. Beilan that the picture was available and that if I consummated a deal, it was to be exhibited starting March 7, 1955.

At that time I told them that we were committed to play an Allied Artists release known as TONIGHT'S THE NIGHT, for a minimum of five weeks, and that unless we

could make arrangements with Allied Artists to reduce the playing time, we would be unable to play EAST OF EDEN on the availability given me of March 7.

Q. Now, did you hear any more about this movie from Warner's?

A. No, sir.

Q. Who finally showed the picture?

(814)

A. It played the Randolph Theatre.

Q. When did it play the Randolph Theatre?

A. April the 9th.

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(816)

Q. Mr. Wren, I show you a document that has been marked for identification as P-98, and I ask you what that is, sir.

A. It is a Metro-Goldwyn-Mayer Pictures license agreement or exhibition contract.

Q. For what motion picture?

A. HIT THE DECK.

Q. What were the terms of that?

A. The picture was to play a minimum of five weeks, 90-10, with an overhead of $4,900 per week for house expense.

Q. Will you explain, please, what that all means? Explain exactly what that means, those terms.

A. The distributor was to receive 90 per cent after the exhibitor had deducted the $4,900, and the exhibitor would take the remaining 10 per cent, if any.

Q. 90 per cent of what, Mr. Wren?

A. Of the net box office receipts.

Q. What do you mean in the business when you say "Net box office receipts"?

(817)

A. That is the admission price after the deduction of the city or Federal or state taxes.

Q. In any case throughout this case and throughout the business when you say "Box office receipts" is it understood that—this is slightly leading, but I think it is explanatory—it always means the gross box office receipts minus taxes?

A. Yes.

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Q. Now, with respect to advertising, did you have any discussions with anybody from Metro?

A. Yes, sir, Mr. Formato.

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(822)

Q. What was your discussion with Mr. Formato, Mr. Wren?

A. That the advertising was to be left open and to be discussed after the picture had played. The advertising was—there was to be no advertising terms whatsoever in the contract because of some problems that they had at the Viking prior to my assuming the management.

Q. And were there any agreements as to what their terms as respect to advertising would be?

A. Metro, MGM was to pay the advertising on the 90-10 deal.

Q. Is it the custom in the licensing of motion pictures for the distributor to pay advertising, all advertising on a 90-10 deal?

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(827)

The Witness: It is.

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(830)

Q. If there is an agreement that the distributor will pay all or part of the advertising, mechanically how is that done, in the case of Metro?

A. Well, in the case of Metro the distributor, which is Metro-Goldwyn-Mayer, reimburses us with a check after tear sheets and bills are submitted to them.

Q. What are tear sheets and bills?

A. They are pages of the newspaper in which the amusement ads appear.

Q. And what would the bills be for?

A. They would be invoices covering the display advertisements put on the amusement page by the exhibitor or the distributor.

Q. Now, with respect to the picture HIT THE DECK, you recounted your conversation with Formato. Was there any further conversation with anybody from Loew's, Metro, with respect to advertising on this picture?

A. Yes. Mr. Gallner, Metro-Goldwyn-Mayer's local advertising representative.

Q. What were those discussions?

A. We laid out the entire campaign for the showing, the pre-opening at first, of HIT THE DECK.

Q. Was there any discussion with respect to the payment?

(831)

A. Yes. Mr. Gallner insisted at the time we started laying out the campaign, Mr. Gallner insisted that the Viking have a house budget pre-opening the first week of $700 and that each subsequent week they would have a house budget of $350, meaning the first week the Viking was to spend the first $700 and each week of the five-week engagement after that the Viking would spend the firt $350. And then Mr. Gallner told us that after deducting $700 from the total campaign for the pre-opening in the first week, we were to share 50 per cent of the cost of the advertising—not that Metro was going to pay the entire amount, that we were to spend 50 per cent.

I told him that we would have to contact Mr. Formato, which we did, and he told us not to worry about it. So we proceeded on that basis because we needed the picture for the theater.

Q. Who was Mr. Formato, Mr. Wren?

A. Mr. Louis Formato was the branch manager for Metro-Goldwyn-Mayer during this period.

Q. Did you incur expenses on this picture for advertising?

A. We did.

Q. And were you reimbursed in full?

A. No, sir, we were not.

Q. With respect to the picture STRATEGIC AIR COMMAND,

(832)

did you have any conversations—By the way, who distributed the picture STRATEGIC AIR COMMAND?

A. Paramount Pictures.

Q. Did you have any conversation with anyone at Paramount Pictures with respect to this motion picture and, if so, whom?

A. Mr. Howard Minsky, the district manager for Paramount, who headquartered in Philadelphia, called me to tell me—

Mr. Ward: Just a second, Mr. Wren. Let's fix the time, may we?

By Mr. Sawyer:

Q. If you recall.

A. Do you mean the time of the day or the time of the year?

Mr. Ward: Of the call from Mr. Minsky.

By Mr. Sawyer:

Q. Do you remember what date it was, Mr. Wren?

A. Sometime in February. It was an early evening call, that I remember.

Mr. Ward: 1955?

The Witness: Yes, sir.

By Mr. Sawyer:

Q. Will you proceed, Mr. Wren.

A. He told me that Paramount had planned on releasing STRATEGIC AIR COMMAND, which was in the new process known as VistaVision; that it would be projected on what is known as

(833)

horizontal projectors, and asked if we were interested in the picture. I told him we were interested in all of their films but before making, having any discussion with reference to STRATEGIC AIR COMMAND we naturally wanted to see the picture. He told me that because of the process whereby it was projected on horizontal projectors, I would not be able to see the picture, that no one in the Philadelphia area had seen the picture. And we told him that we were not interested in buying a pig in a poke but we wanted to see what we were buying.

Subsequently we received solicitation letters from Paramount outlining the sales plan that they had for STRATEGIC AIR COMMAND.

Q. I show you P-29, a document which has been marked P-29.

Mr. Wolf: What number?

Mr. Sawyer: P-29.

By Mr. Sawyer:

Q. Is that the solicitation letter that you referred to?

A. This is part.

It says: "We are enclosing form of our request for offer to be used for such purpose."

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(834)

Q. Now, I invite your attention—well, first of all, on the screening. Did you ever screen the picture?

A. No, sir, we did not.

Q. Did you ever find out whether or not the picture was screened in the East?

A. Yes, it was screened in Washington, D.C.

Q. Were you informed of that screening before it took place?

A. No, sir, we were not.

Q. Now, in the solicitation letter, is there anything in that letter with respect to the installation of special equipment to show this picture?

Mr. Ward: Sir, I object to that because I think documents ought to carry their own weight and it is obvious they don't require any elaboration by the witness.

Mr. Sawyer: I withdraw the question, Your Honor.

By Mr. Sawyer:

Q. Will you read paragraph 2 of page 2 of that letter. (835)

Mr. Ward: We have no objection to the letter whatsoever.

The Witness: "If the picture is licensed to you, it will be our obligation to loan to you only for this special advance engagement of STRATEGIC AIR COMMAND two horizontal projection machines, the installation of which the exhibitor will be responsible. These two projectors represent a cost to us in excess of $10,000. After the run of the picture, the machines may be removed by us."

By Mr. Sawyer:

Q. Who finally played this picture in Philadelphia, Mr. Wren?

A. The Stanley Warner chain, Stanley Theatre.

Q. And on whose side of the split did this picture fall?

A. I do not know.

Mr. Ward: If you know.

The Witness: I do not know.

By Mr. Sawyer:

Q. And, in fact, did the exhibitor, Stanley Warner, Stanley, pay for the installation of that equipment?

Mr. Ward: Objection.

The Witness: They did not.

Mr. Ward: Just a minute, Mr. Wren, and when I make an objection I wish you would wait until the Court rules

(836)

on it.

The witness is asked a question as to whether or not Stanley Warner made a payment of something. It is objectionable not only because it is not within the competence of this witness to know what Stanley Warner did unless he shows he is qualified, but I point out to Your Honor that the excerpt from the invitation to bid, which the witness just read, said, "If the picture is licensed to you," that is the introductory clause of the sentence, "If the picture is licensed to you," such and such will be done about the projection apparatus. Therefore, for those two reasons I object.

(837)

Mr. Sawyer: I will show him P-28, Your Honor.

By Mr. Sawyer:

Q. I show you a document which has been marked for identification P-28 and ask you what that document is.

A. It is Paramount Film Distributing Corporation's, the exhibitor's copy of the Paramount Film Distributing

Corporation license agreement covering the special pre-release engagement of STRATEGIC AIR COMMAND at the Stanley Theatre, the length of the run to be determined entirely by the distributor. The terms—

Q. Aside from the terms, Mr. Wren, is there a provision in that contract, and if there is, please read it, respecting who was to pay for the cost of the installation.

Mr. Ward: That is objected to for the reason that I just gave, sir.

This letter which has been marked P-28 I believe is simply an invitation by the Paramount Film Distributing Corporation to Mr. Wren of the Viking Theatre to make an offer for STRATEGIC AIR. COMMAND, and they go on to say—If the picture is licensed to you it will be the obligation of Paramount to do certain things.

Now, there was neither a bid for it by Viking nor was there a license of the picture by Paramount to Viking, and it sems to me, therefore, that to go into the

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question of what the contract provided with respect to the result of negotiations with another exhibitor is quite beside the point. And I think it only tends to confuse and to create an issue that is not in reality in the case, sir.

Mr. Sawyer: Do you want to hear from me, sir?

The Court: Yes.

Mr. Sawyer: Well, Your Honor, the point of it is that the invitation tells the possible bidder Viking that if they are awarded this the exhibitor—I will read it: Two horizontal projection machines, the installation of which the exhibitor will be responsible.

Now, might it not be a factor in whether or not Viking decided to bid, aside from the fact that they didn't screen the picture, as to whether or not they had to pay for this installation? Now we see, when the picture is licensed to another theater, that the clause in the license agreement does not require the exhibitor to pay for the cost of installation.

That is the point of it, Your Honor. It goes again to discrimination and it explains in this particular case why perhaps the Viking didn't bid, because they had a cost item that they were told was going to be charged against them, but it wasn't charged against others. It is the same question that goes to discrimination, Your Honor.

Mr. Ward: I might point out in addition to
(839)

what I have said, that in the statement of contentions the only area with respect to which it was proposed that this witness would testify was that he did not have an opportunity or was not afforded an opportunity to screen STRATEGIC AIR COMMAND. There was no reference in the statement of contentions with respect to the terms of a subsequent license agreement to some other exhibitor as to this picture, which Viking had no interest in; for which it did not seek a license at all. And to approach this problem by a process of hindsight seems to me to be contrary to all the rules of evidence and to all the concepts of antitrust litigation.

I cannot stress too strongly, sir, that this is not a contract upon which the plaintiff relies here, this is simply an invitation to bid, and let me repeat this language: If the picture is licensed to you, says this exhibit, it will be our obligation to loan to you only for the special advance engagement of STRATEGIC AIR

COMMAND two horizontal projection machines, the installation of which the exhibitor will be responsible—the installation of which. These two projectors represent a cost to us, Paramount, in excess of $10,000.

That is the cost, sir, parenthetically, that Paramount assumes, and then, finally, the last sentence of the paragraph: After the run of the picture the machines

(840)

may be removed by us.

Now, that is simply an offer to treat, an invitation to bid.

The Court: All right. Now, what is P-28?

Mr. Ward: P-28, sir, purports to be a copy, the exhibitor's copy of the picture STRATEGIC AIR COMMAND between Paramount Film Distributing Corporation and Stanley Warner Management Company, which licensed the picture, and the terms of the contract under which Stanley Warner was given the license to exhibit this film are set forth in this contract.

Viking is not a party to it, and it is something that was discovered long after, through discovery proceedings, the picture was released.

The Court: Mr. Sawyer, how can this witness testify as to this exhibit, P-28?

The question is, did Stanley pay the cost of installation? Now, how would he know? He would not know whether Stanley paid the cost of the installation.

Mr. Sawyer: It is on the contract, Your Honor.

The Court: How does he know about whether the contract is authentic?

Mr. Sawyer: Because it has been initialed by the defendants as authentic. They gave it to us.

(841)

Mr. Ward: Well, it is not self-proving.

Mr. Sawyer: So it is what the contract says.

Your Honor, if you go to somebody and you say to them, Now, if you want this product you will have to pay for the beans and pay for the bags that the beans come in and therefore, he says, I can't stand that, I can't pay for the bags too, so he doesn't. And then he finds that his competitor got the beans without paying for the bags, this is an element of discrimination, and that is the whole principle of this proof. This witness testifies that he knows from this contract which has been supplied by the defendants and has been initialed as being authentic.

The Court: Now, Mr. Ward, as I understand it, if Mr. Minsky were on the stand and he were asked whether that is so, he would say, Yes, it is. So therefore, it is just a matter of proof.

Mr. Ward: I do not think he would, sir. I do not think that necessarily follows and that ought not to be a burden to be thrust upon us unless this evidence has some evidential value, which I am trying to point out, sir, that it cannot possibly have.

The complaint here is discrimination. This is the first time that such a notion has been introduced with respect to this particular part of the case. I read to

(842)

Your Honor the statement of contentions, which is completely silent on this proposed now to be proof, and indeed Mr. Wren, and I have before me his own sworn statement, said that the only complaint he has is screening. And now to introduce this, not only comes as a surprise, but apart from that it has no evidential value, because this is not a contract. There is no evidence

of discrimination. Just because they make a proposal to X does not mean that they have to carry out that same proposal to Y. They are free to negotiate.

The Court: Well, I will sustain the objection because obviously this witness is asked a question: Did Stanley ever pay for this cost of installation? He is shown a paper that Stanley has made up, and says, according to this, no.

Mr. Sawyer: Well, Your Honor—

The Court: How does he know? I will sustain the objection.

Mr. Sawyer: Your Honor, this document was to come in through another witness.

The Court: That is right.

Mr. Sawyer: They wanted the case changed around. So how can I proceed, Your Honor. This document was to be proved—

The Court: It still will be proved.

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Mr. Sawyer: —by Mr. Minsky.

The Court: It still will be proved by another witness.

Mr. Sawyer: Well, Your Honor, we will never get anywhere.

The Court: What is the difference?

Mr. Sawyer: Well, we talk about STRATEGIC AIR COMMAND and maybe two weeks later another witness testifies as to one fragment of it.

Is Your Honor ruling that in examination of Mr. Wren I cannot use documents that are authenticated, agreed to, initialed by the defendants as authentic, having a bearing on the exact events and the things that happened to the Viking in their seeking to license these pictures?

Mr. Ward: All these things can be proved in a proper way. There is no objection to that.

Mr. Sawyer: There is no way, Your Honor, in which this thing could have any continuity whatever, nobody can make head or tail out of it.

The Court: Let us assume, as he will, he has already said, according to this Stanley didn't pay it. Would that make the exhibit competent? Isn't it merely surplusage? What does it mean for him to say he looked at the contract and according to this Stanley did not pay for it?

(844)

Mr. Sawyer: Let us assume he reads the provision and does not characterize it. He reads what is on it.

The Court: All right.

Mr. Sawyer: This witness testifies in effect, he says, I was informed that the conditions that I had to live up to were X and Y.

The Court: Right.

Mr. Sawyer: He then produces, the witness then in effect produces or there is produced to the witness for inspection a document—

The Court: Yes.

Mr. Sawyer: —the authenticity of which is agreed upon, which originated with the defendants, and he

says, But I see by this document that my competitor did not have to live up to that.

Now, remember, here is an antitrust case in which the gist of the thing is unequal treatment, and the witness says, This is what I had to live up to, here is what my competitor had to live up to. And to demonstrate the lack of it he refers to a document, because why? I asked him, Your Honor, if you will recall—I didn't bring this document in, I asked the witness: Did Stanley Warner pay for the exhibition? And there was an immediate objection over here.

Now, the question, I submit, that I originally

(845)

asked was the proper one. The question is, did they? The witness answers yes or no and may then be cross-examined as to how he knows that.

Originally he is asked: Did Stanley pay when they played the picture? Answer: No, they did not.

That would be technically correct, whereupon the defendants then, when their turn comes, may cross-examine him on that. The witness can answer yes or no, or I don't know.

That was my original question. Objection because the contract speaks for itself. There must have been a contract for this picture. Produce it. I produced the contract. Now they object to the contract. I will withdraw the contract and ask the witness the question.

Mr. Ward: First of all, I recollect that Your Honor had ruled on this, but let me say, Your Honor, that under Mr. Sawyer's concept of a trial a witness could be put on the stand and testify freely without regard to the restrictions of the rules of evidence and have the day saved simply by saying, You can cross-examine him. But what my friend is doing here is ignoring the fact that the exhibit that he first presented is simply an invitation to bid or to negotiate terms. Viking saw fit

not to do so. For all that appears Paramount may have gone to Stanley Warner with the

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same letter and Stanley Warner may not have been willing to negotiate on those terms just as Viking apparently was not.

So a new contract with new terms was formulated and that new contract is now sought to be used to show discrimination. You cannot bridge the gap that easily, aside from which, as Your Honor correctly observed, this witness cannot testify with respect to documents and to the actions of parties with which he is not familiar and has no knowledge.

The Court: I will sustain the objection.

You will have an opportunity to prove it through Mr. Minsky as to what Stanley did or did not do.

Mr. Sawyer: All right, Your Honor.

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(847)

By Mr. Sawyer:

Q. During the time that you are speaking about these events connected with STRATEGIC AIR COMMAND do you recall what picture Viking was playing?

A. Probably HIT THE DECK.

Q. What picture did the Viking play after HIT THE DECK?

A. THE GLASS SLIPPER.

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(858)

Q. With respect to the picture PRODIGAL produced by Loew's, Mr. Wren, what did your original bid offer with respect to advertising on the first week?

A. The Viking—

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(859)

A. The original bid which the Viking Theatre submitted for the Metro-Goldwyn-Mayer release THE PRODIGAL contained an advertising clause saying that the Viking Theatre would share 50 per cent of the cost of advertising, which was to include the advertising items that were listed in that bid.

I received a call from Mr. Louis Formato, the branch manager, who told me that we would be given the picture provided we changed the advertising clause to read 50 per cent of all advertising, which we condescended to, and we sent him a letter confirming our conversation.

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(861)

Q. I show you a document which has been marked for identification as P-151, and I ask you to identify that.

A. It is a letter to Mr. Edward Heiber, Branch Manager of the Universal Film Exchanges, Incorporated, having to do with our submitting an offer for the motion picture, submitting an offer to his New York office, for the motion picture FOX FIRE.

Q. Who signed the letter?

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A. I did.

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Q. What is the guarantee, if any?

A. $8,000 minimum guarantee.

Q. What is the playing time?

A. A minimum of two weeks.

Q. Is there a percentage offered?

A. Yes, the guarantee of $8,000 was against 45 per cent of the gross receipts after deducting weekly cost of shorts and news and/or second feature.

Q. Where did the picture play?

A. Stanley Warner Mastbaum.

Q. I show you Universal cutoff card and ask you if there is an entry thereon with respect to FOX FIRE.

Mr. Ward: Answer yes or no first.

A. Yes.

By Mr. Sawyer:

Q. What does it show that the Mastbaum Theatre paid the distributor of Universal for the showing of this film?

Mr. Ward: That is objected to, if Your Honor please.

The Court: We have the same problem as before, and I ruled that the objection would be sustained. I think that my ruling along those lines will be the same. In other words, this witness, Mr. Wren, does not know what arrangement was made betwen the Mastbaum Stanley Company and Universal

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distributors except when you show him a cutoff card. He doesn't know. To him that is hearsay. That is no more than if somebody told him what the Mastbaum paid.

Mr. Wolf: Or why the Mastbaum paid whatever it paid.

The Court: Or why. I don't think that you can show what any of the distributors did where Viking submitted a bid and didn't get the picture. I don't think this witness knows. He knows that, "We gave a guarantee of so much; we bid this much; we didn't get the picture." "Who got it?" "Mastbaum." He doesn't know of his own knowledge what terms there were. You would be able to prove that by bringing in, as you intend to do, officers of Universal, because that is where you got the card.

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Mr. Sawyer: Well, Your Honor, if he does know, is it all right if he answers?

The Court: How would he know? In other words, he wouldn't know unless somebody told him, would he?

Mr. Sawyer: No, but he may have found out after discovery, he may well have found out later on what—

The Court: How could he find it out except through the card or what somebody else told him?

Mr. Sawyer: Because the defendants told him. Now, if the defendants told him, I agree if he heard it on Vine Street he couldn't, it would be improper, but may he not testify what the defendants subsequently told him?

The Court: Well who?

Mr. Sawyer: In this case Stanley Warner. It is their cut-off card. I said Universal, I think it is the Stanley Warner cut-off card. Stanley Warner told him.

Mr. Ward: It is the same paper.

The Court: Who in Stanley Warner told him?

Mr. Ward: This paper, that is what he was talking about, sir.

Mr. Sawyer: Yes, of course.

The Court: Nobody told him. He looked at a paper.

Mr. Sawyer: Your Honor, if the defendants

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submit a paper and the paper, in effect, says—not in effect, but the paper says how much the Mastbaum paid, that the defendants have then told him if he looks at

the paper. They gave it to him. He is the officer of the plaintiff and they then told him.

Now, I don't see why he can't testify. They have told him. It comes to him because it is an admission by them.

The Court: No.

Mr. Sawyer: I don't see what is wrong with that.

The Court: You see, an admission, it would have to be some officer of the company.

Mr. Sawyer: This is by an officer of the company.

The Court: An agent who has authority to make the admission.

Mr. Sawyer: This did come from an agent who has the authority.

The Court: I adhere to my ruling. I don't see how you are harmed. Your position in these cases is that Viking made a guarantee, made a percentage, and so on; they didn't get the picture. Now, somebody else got it, and to show what somebody else paid you will have to do it by—

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Mr. Sawyer: I am only harmed because it seems to me that it will be impossible for Your Honor or the jury to connect one with the other three weeks from now. Inasmuch if there were doubts about the authenticity of the papers, that would be one thing; but inasmuch as I think Your Honor would have to agree that technically, now maybe this is somewhat technical, but technically what we have here is an admission, an admission by an authorized agent of the defendant respecting this fact which comes to the witness's atten-

tion in the course of his duties. And technically that is an admission and technically he can testify to it.

Now, since as a practical matter, the effect of the evidence is to say what Viking did on the one hand and the guarantee situation, how it actually happened on the other, and the jury—it is very hard, I mean in the time I have been in this thing, to remember these pictures—they are never going to be able to put it together. And when we come to the other person, whoever it is, that could testify as to what the Mastbaum paid, he will say, "I don't know anything as to what the Viking did," and so it will be closed off on that end and we will never have any way to put the two together and the two facts in themselves standing individually mean nothing. The only thing that has any significance is the comparison of the two. Technically this is an admission, I

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think that is technically correct. Here is a document with a piece of information in it submitted just the same as any time somebody walked up to Mr. Wren, and he is president of the Stanley—Mr. Fabian, for instance, if he came up to him and said, Do you know on FOX FIRE Mastbaum paid the following. Now, he is the head of the thing and if he submits through his authorized representative the same information, it is an admission.

And if this witness has that information, it has been submitted to him, I fail to see why it doesn't come in like any other admission against Stanley Warner.

The Court: No. I am inclined to agree with you, Mr. Sawyer, that I think that perhaps the defendant's objection is highly technical because, it seems to me, you are going to be able to get it in some time if, as you say—

Mr. Sawyer: They know I will get it in.

The Court: But at this point we know nothing about it except that you say that it is a record made by Stanley.

Mr. Sawyer: Well, if there is any disagreement about that, Your Honor, we can straighten that out as to whether this is in fact the Stanley Warner cut-off card.

The Court: All right, it was furnished so, therefore, it was made by Stanley Warner. But still there is

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a question as to its admissibility, as to whether the facts on it are correct.

Mr. Sawyer: They have an opportunity on that, Your Honor, but if they submitted the facts without qualifications, I suppose that we are entitled to believe that their records are correct, subject, of course, in the sense that they can't be prevented from rebutting them. If that were the issue, I would agree. Nothing in that submission means that they cannot rebut them. But, Your Honor, if it is technical, and Your Honor has made some rulings in the context of making this understandable to the jury, and that is why we find these documents coming up this way instead of originally through the others, and if that be so, and since it's got to come in any way, as Your Honor and as we both agree and well know, I don't see why it can't come in in a way in which Your Honor and the jury can appreciate the significance.

It will be humanly impossible for Mr. Wren to testify about these long series of cases and events and then a few weeks later have someone else testify to them, and nobody could possibly connect this. I would't remember it myself if it weren't down in the same place because first we have to see the Viking guarantee and

then we have to see what the Mastbaum actually paid, and if you don't put those two

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together, Your Honor, it might just as well not be in the case because it wouldn't mean anything to the jury two weeks from now. They couldn't possibly remember FIX FIRE from another movie of somewhat the same name or a dozen others.

I submit that once it will come in, since there is no question about it being some document with which we don't all agree, that it serves the orderly understanding of the case if Mr. Wren while he is there can say that. If there is a document that comes up among any of these in which there is a disagreement and then, of course, that can't be used, I have to prove it first.

I really submit to Your Honor that it would be understandable if we did it that way and the way as it is it is not going to be understandable.

Mr. Wolf: Your Honor, you can see very clearly when the Viking withdrew its bid an entirely different situation was created with respect to the disposition of this film and the circumstances in which subsequent to that time it was negotiated to the Mastbaum and the price was then paid bears no relevancy, has no relevancy with respect to the bid of the Viking in any comparison.

Mr. Nizer: May I be heard, Your Honor, for just one second.

The impression attempted to be given by

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plaintiff's counsel is that this is a technical objection. It is far from that. It goes to the improper attempt to create a fragmented impression which plaintiff's counsel has carefully selected.

For example, in this case, as Mr. Wolf has just said, the Viking withdrew their offer.

Mr. Sawyer: We are going to cover that.

Mr. Nizer: You have not covered it and you are making the argument to the Court as if you are going to compare the hereafter result, after a picture plays, with an offer that he made which he withdrew and we were left without an opportunity to deal with it.

So that when it is claimed here that this should go in, it will come in anyhow, it won't come in this way, and the true and the full facts will come out if you do this in orderly manner.

We are not making a technical objection, Your Honor. We will waive them when that kind of situation arises. This is a partial carefully selected attempt at impression, either wittingly or unwittingly, to give the impression that he made a certain offer, that Stanley Warner played it, and after the fact, knowing what they received, that result wasn't perhaps as good as his should have been; but he omits the intervening fact that he withdrew his offer, and the reason

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he withdrew his offer appears in writing which I would invite plaintiff to offer in this case, to give the evidence as to why he withdrew the offer.

The Court: Mr. Sawyer, you are going to have to connect it up some time in the case in your own mind because in your closing to the jury you certainly have to know all these facts and these pictures so that—

Mr. Sawyer: I know them, Your Honor.

The Court: —so that you will have that information before you.

Mr. Sawyer: I know them. I have it down here, the comparison between these two things. I am just sub-

mitting that the jury and Your Honor won't be able to —well, in this sense, somewhere in this, what will then be an immense record will be at one point, at page— probably we are up to 932 will be what the Viking's guarantee was and at page 1757 will be what was actually paid, and I hope, if I can keep my wits about me, I will remember those two facts. I have them together.

The Court: You will know them, won't you?

Mr. Sawyer: Certainly. I already have it, Your Honor. But the point is that it won't make any impression. The trial of the case isn't to be merely just to have a stacked-up record so that at the end a lawyer can close to

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the jury amid all the arguments as to recollection as to what records did show. It would be normally that as evidence comes in, the gist and the point of it is perceived.

The Court: I think you may have a point that the jury ought to have the opportunity to compare your bid and another bid. I would suggest to you in order that that be done, when you say Mr. Minsky is here, you can say that Mr. Wren testified that he gave such and such a bid. Now, Mr. Minsky, you played this for the Stanley. What was your bid?

Mr. Sawyer: Well, Mr. Minsky was here, Your Honor, and I think that that would have been—I have doubt about that, that is the way to do it, but we are on this other process now, and Mr. Minsky may be a long time coming.

I submit, Your Honor, just in the interest of clarity—

The Court: Well, no matter how long it is, doesn't that compare it? If I permit you to do that, doesn't the jury have the comparison?

Mr. Sawyer: You mean if I am permitted to ask him about the Viking bid. But I know what his answer is going to be to that. That is going to be, "Well, I don't know what they bid."

The Court: That is all right.

(873)

Mr. Sawyer: Then there I am.

The Court: You are not asking them what Mr. Wren said. He won't know what Mr. Wren said but—

Mr. Sawyer: He won't know what Mr. Wren bid. At least, he shouldn't since he is another exhibitor. And there we will be, Your Honor. Universal people would know but that would involve Universal witnesses that I don't believe that we planned to call. Universal would know about both bids to be shown.

Mr. Nizer: And you have not called Universal.

Mr. Sawyer: That's right.

The Court: Well, how are you going to get these Universal exhibits in?

Mr. Sawyer: Well, the Universal exhibits, Your Honor, I don't know that there are Universal exhibits as such. This is a Stanley Warner exhibit here. This is a Stanley Warner cut-off card.

Mr. Nizer: It is a Universal picture.

Mr. Sawyer: It is a Universal picture but it is Stanely Warner, it is their cut-off card, it is their record of what they paid.

The Court: Well, you don't need Universal, do you?

Mr. Sawyer: No, sir, I don't.

(874)

The Court: Well, you have Stanley.

Mr. Sawyer: That's right, but Stanely won't know what Viking bid.

The Court: No, they won't know what Viking bid.

Mr. Sawyer: In other words, under this way of doing it, Your Honor, there will never be a given moment in time and, of course, we understand we are taking time with this, because this isn't just a question of FOX FIRE, it is a question of a great number of pictures. They will never have at any one given moment in time before them the comparison which I strive to bring before them. I strive to put before them a comparison which I hope they will conclude demonstrated an unfairness in design because of the two bids were so obviously, or the bid and the result were so obviously in disparity.

The Court: Isn't your bid in the same predicament, Mr. Sawyer, wouldn't you be in the same predicament if you had called Mr. Minsky and Mr. Minsky says, "Yes, this adjustment; yes, this adjustment." Well, then, when were you going to have Mr. Wren testify?

Mr. Sawyer: By that time this card would have been admitted into evidence.

The Court: All right. Still Mr. Wren wouldn't

(875)

know.

Mr. Sawyer: Well, the document having been admitted into evidence, it could be referred to later on.

I could pick it up then if it is in evidence and read it, Your Honor. Once it is in evidence—

The Court: I have made a suggestion. My ruling stands. I have made a suggestion that my present indication is that when you have Minsky or any of these other fellows in, and you are able to ask leading questions, say, assuming that Viking bid this, what did Mastbaum bid.

Mr. Sawyer: Well, of course, Your Honor, it is really the same thing the other way around because by that time then instead of it being that the Mastbaum bid or the Mastbaum license was first in evidence, and then we could have Mr. Wren, then the Viking bid will be in evidence, I will move to admit it, and then at the time when Mr. Minsky is on, I presume that since it will be then in evidence, I can read the Viking bid, it then being actually in evidence, this particular document he just had before him. And if I can do that then the problem would largely be solved.

The Court: I am not ruling on that because it is not before me. I have ruled and if I am in error you have an exception.

(876)

By Mr. Sawyer:

Q. Did the Viking withdraw its bid on FOX FIRE?

A. After thirteen days. We received no reply from Universal; we were obliged to withdraw.

Q. And did you notify Universal and, if so, who at Universal, with respect to withdrawing that bid?

A. I believe we wired their New York office saying that we had waited thirteen days, what we thought was a reasonable length of time, and not having heard from them we were obliged to withdraw our offer.

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(877)

Q. Who produced the motion picture SUMMERTIME?

A. United Artists Corporation. They didn't produce it, they released the picture.

• • •

Q. And would you tell us what happened with respect to that picture in connection with the Viking Theatre?

A. We submitted an offer, a guarantee of $12,500, the terms

(878)

90 over $4970.19, which were identical terms to those which were acceptable to United Artists for NOT AS A STRANGER. The picture was to follow NOT AS A STRANGER.

Q. I show you document marked P-74 and ask you what that is.

A. This is page 2 of the United Artists Corporation competitive bid and application and contract for the motion picture SUMMERTIME which was submitted by the Viking Theatre and contains the bid of the Viking Theatre which reads: "$12,500 minimum guarantee versus 90-10 over house expense of $4970.19. Guarantee to cover the entire engagement 21 consecutive days. If the second week's gross equals or exceeds $9000 SUMMERTIME will be held for a fourth week. If the third week's gross exceeds $9000, picture will be held for a fifth week. Approximately on availability. Distributor will pay for all advertising including newspaper ads and engraving; all radio and TV spot announcements; four painted bulletin boards and daters as well as 14-24 sheet billboards and daters; theatre lobby and front displays marquee valance, exploitation, etc."

Q. Did you receive any advance notice from United Artists as to this picture being released?

A. Only through this competitive bid application, which is, in effect, the solicitation letter.

Q. How were you informed as to what were the acceptable

(879)

national terms in view of United Artists for this picture?

A. We were never apprised as to what their minimum national terms were or acceptable terms.

Q. Was this offer accepted or rejected?

A. It was rejected.

Q. And did you receive notice of rejection?

A. Yes, sir. July 14 United Artists Corporation advised us, told us "That this is to advise you that all bids submitted on SUMMERTIME have been rejected for the reason that the terms offered are unsatisfactory. We, however, will afford you an opportunity to negotiate for this picture and will communicate with you in the near future, and we will likewise do the same with other theaters. We want to thank you very much for your interest in this subject. Kindest regards."

It was signed by Gene Tunick, who was the branch manager at that time.

Q. And was there any opportunity to negotiate afforded you?

A. No, sir.

Q. Was there any contact made by Mr. Tunick or anyone else on behalf of United Artists with respect to this picture?

A. No, sir.

Q. What was the next thing you heard about this picture?

A. That the picture had been awarded to the Randolph Theatre; that it was to play a minimum of eight weeks; that

(880)

there was no guarantee.

Q. How long did it play?

A. Four weeks.

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(882)

Mr. Sawyer: Your Honor, this is in answer to a request for admission by United Artists. This is No. 2E.

• • •

On or about July 15, 1955, you—and this refers to the answer regarding United Artists—negotiated a license for the picture with William Goldman Theatres, Inc.—and it really referred to the

(883)

picture SUMMERTIME—for exhibition at the Midtown Theatre for a minimum of eight weeks, no cash guarantee, and a film rental of 50 per cent of the gross receipts for the first week; 40 to 50 per cent on a sliding scale for the second week; and 25 to 50 per cent on a sliding scale for the remaining five weeks.

Answer: Denied. This defendant denies that it negotiated a license agreement for SUMMERTIME on July 15, 1955, and states that such a negotiation occurred on July 19, 1955.

This defendant denies that the agreed film rental was to be 25 to 50 per cent on a sliding scale for the third week, and, to the contrary, states that the film rental for the third week of exhibition was to be 40 to 50 per cent on a sliding scale.

The other statements in this request are admitted.

This is 2G:

This contract was changed on or about September 9, 1955, so as to reduce the minimum eight weeks' playing time to four weeks.

Answer: Denied. It is admitted that William Goldman Theatres, Incorporated only played the motion picture SUMMERTIME for four weeks and refused to play the motion

(884)

picture for an additional time. This defendant protested this breach of contract by William Goldman Theatres, Inc., but short of filing a lawsuit was unable to compel the completion of the contract. Subsequently, when it became apparent that William Goldman Theatres, Inc., would not play the picture for the additional four weeks, consequently the Accounting Department of this defendant was advised to write this matter off on its books.

• • •

(886)

Q. I show you a document that has been marked P-35 and ask you what that is.

A. It is a copy of a bid which was sent out over my signature for the Viking Theatre for the motion picture THE McCONNELL STORY.

Q. What was the bid for THE McCONNELL STORY?

A. Distributor—meaning Stanley—I mean Warner Brothers—to receive 80 per cent of each week's gross receipts after deducting from each week's gross receipts the following items before computing film rental:

$5,250 weekly house expense.

Actual cost of shorts and news shown during the week.

Advertising.

Advertising being pre-opening and first week's—all advertising including teaser and first week's newspaper ads, and the necessary engravings; radio and TV announcements; training costs and rental of four painted billboards and daters; rental for 14 twenty-eight sheet billboards; all lobby and front displays; marquee valance; exploitation, etc.

Subsequent weeks—all newspaper advertising and engravings; weekly rental for four painted billboards

(887)

and 14 twenty-eight sheet billboards as well as any additional radio and TV announcements, exploitation, etc.

The play date and length of run was—

Approximately on availability which we have been advised is on or about August 25.

Guaranteed run of four weeks.

Picture to be held for additional periods of seven days if the gross receipts for the first four days of the week immediately preceding average $900 per unit, i.e., 3/10 for Saturday, 2/10 for Sunday, and Holidays; 1/10 for each other day.

Mr. Sawyer: Now I ask to have this marked P-155.

(Letter from C. M. Beilan, Warner Brothers Pictures, to Mr. Jay Wren, Viking Theatre, dated July 19, 1955, was marked Plaintiff's Exhibit 155 for identification.)

By Mr. Sawyer:

Q. What was the next thing you heard on THE McCONNELL STORY, Mr. Wren?

A. On July 19, 1955, we were advised that—

Please be advised that your offer for a license to exhibit the picture THE McCONNELL STORY at the Viking Theatre, Philadelphia, has not been accepted.

We have accepted the offer submitted by the

(888)

William Goldman Theatres, Inc.

And it is signed by Mr. Charles M. Beilan, the Branch Manager for Warner Brothers Pictures.

Q. Did you ever have an opportunity to negotiate for this picture?

A. We did not.

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(889)

Q. Now, I invite your attention to—what is it, Mr. Wren?

A. P-37.

Q. What is P-37?

A. It is a copy of the bid the management of the Viking Theatre submitted on August 2, 1955, for the Warner Brothers release of PETE KELLY'S BLUES.

Q. What did the Viking bid on that picture?

A. Distributor to receive 80 per cent of each

(890)

week's gross receipts after deducting from each week's gross receipts the following items before computing film rental:

$5,250 weekly house expense.

Actual cost of shorts and news shown during the week.

Advertising:

Pre-opening and first week—all advertising including teaser and first week's newspaper ads, and the necessary engravings; radio and TV announcements; painting costs and rental of four painted billboards and daters; rental for 14 twenty-eight sheet billboards; all lobby and front displays; marquee valance; exploitation, etc.

Subsequent weeks—all newspaper advertising and engravings; weekly rental for four painted billboards and 14 twenty-sheet billboards as well as any additional radio and TV announcements, exploitation, etc.

Play date and length of run:

Approximately on availability.

Guaranteed run of four weeks.

Picture to be held for additional periods

(890)

of seven days if gross receipts for the first four days of week immediately preceding average $900 per unit, i.e., 3/10 for Saturday, 2/10 for Sunday, and Holidays, 1/10 for each other day.

Mr. Sawyer: I ask to have this marked P-156.

(Letter from C. M. Beilan, Warner Brothers Pictures, to Jay Wren, Viking Theatre, dated August 4, 1955, was marked Plaintiff's Exhibit 156 for identification.)

By Mr. Sawyer:

Q. I show you document which has been marked P-156 and ask you what that is.

A. August 4, 1955, Warner Brothers Pictures Distributing Corporation sent me a letter which reads:

Please be advised that your offer for a license to exhibit the picture PETE KELLY'S BLUES at the Viking Theatre, Philadelphia, has not been accepted.

We have accepted the offer submitted for the Goldman Theatre.

Cordially yours,

C. M. Beilan,
Branch Manager.

* * *

(892)

Mr. Sawyer: This is Interrogatory No. 5 addressed to William Goldman Theatres, Incorporated, and the answer thereto—I am sorry, Interrogatory No. 1, Your Honor, and the answer thereto.

State the name of each picture on which you submitted a competitive bid, the name of the distributor of the picture, the theatre for which the bid was submitted, whether the bid was oral or written, the date of the bid, whether or not such picture was awarded

to you on such competitive bid, and, if so, the date of the award.

I read, Your Honor, the portion of the answer listing the pictures:

ANYTHING GOES.
THE SWAN.
THE PROUD AND THE PROFANE.
BWANA JUNCTION.
THAT CERTAIN FEELING.
BIRDS AND BEES.

(893)

PARTNERS.
THE MOUNTAIN.
TEA AND SYMPATHY.
FRIENDLY PERSUASION.
TOWARD THE UNKNOWN.

There are three pictures that did not come within the period of the suit, Your Honor. I will omit their names.

Oh, they did, I will read the names:

BABY DOLL.
HOLLYWOOD OR BUST.
THREE VIOLENT PEOPLE.

By Mr. Sawyer:

Q. Was there any communication with you, Mr. Wren, after that notice?

A. No, sir.

Q. Now I invite your attention to the motion picture GUYS AND DOLLS, and ask you who produced that picture. Excuse me, who distributed that picture.

A. It was a Samuel Goldwyn production released by MGM or Loew's Incorporated.

Q. Did the Viking bid on that picture?

A. We did.

• • •

(896)

Q. Now, did Viking submit a bid on Loew's GUYS AND DOLLS?

A. Yes.

Q. I show you a document which has been marked P-101.

Let me see it again, if you will, Mr. Wren.

Now, what were the terms offered to the distributor Loew's for that picture?

A. The distributor's share of the gross receipts during any week, computed separately and not cumulatively, shall be 90 per cent of the gross receipts after deducting:

$4,970.19 average weekly operating expense.

Weekly cost of shorts and news shown during the exhibition not to exceed $150 per week.

The cost of any additional help or overtime designed to produce additional revenue at the boxoffice, regardless of whether such additional revenue is produced.

Weekly cost of only the forms of advertising, publicity and exploitation hereinafter specified.

Q. Now, was there a guaranteed playing time?

A. Eight weeks including Thanksgiving, Christmas and New Year's.

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(898)

Q. Did you receive any rejection of that bid?

A. Never.

Q. Did you ever have any further communication with Loew's respecting this picture?

A. No, sir.

Q. What was the next thing you knew?

A. That the picture was playing the Randolph Theatre.

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(899)

Q. In regard to the picture LEFT HAND OF GOD, Mr. Wren, by whom was that picture distributed?

A. Twentieth Century-Fox Film Corporation.

Q. Who was in that picture?

A. Humphrey Bogart, and I believe Jean Crain or Gene Tierney.

Q. Did you receive an invitation to bid on that picture?

A. I did.

Mr. Sawyer: I ask to have this document marked as P-157.

(Copy of a Twentieth Century-Fox Film Corporation request for offer was marked for identification as P-157.)

By Mr. Sawyer:

Q. I show you what has been marked for identification as

(900)

P-157 and I ask you what that document is.

A. I would say a copy of a Twentieth Century-Fox Film Corporation request for offer.

Q. Does it specify as to which picture?

A. LEFT HAND OF GOD.

Q. Does it specify the time at which the offer must be in the hands of Twentieth Century-Fox?

A. It says your offer must be in our hands before Wednesday, August 31, 10:30 A.M.—on or before Wednesday, August 31, 10:30 A.M. The "on or" is typed in.

Q. What happened on or about August 21 at 10:30 A.M.?

A. August 31.

Q. August 31?

A. Well, at 10:30 A.M. the Viking, the Fox, and I believe the Arcadia Theatre, were at the local Twentieth Cen-

tury-Fox branch office, at which time the three of us submitted offers or bids for LEFT HAND OF GOD.

We submitted the offers to a Mr. Hy Bettinger who at that time was handling the office affairs because of Mr. Diamond's absence. Mr. Diamond at that time was vacationing in Miami Beach, Florida. Mr. Bettinger was the general sales manager—I mean the city sales manager at that time, and he was handling all of Mr. Diamond's duties.

The Viking, the Fox and the Arcadia submitted

(901)

offers at the appointed time. At the time we gave our offers Mr. Bettinger told us he would have to relay the information contained in the offers to both Mr. Diamond, the branch manager who was vacationing in Florida, as well as his immediate superiors at the Twentieth Century-Fox home office in New York City.

In my presence and in the presence of others, he called New York City to tell them that he had the bids before him and that in his opinion the Viking Theatre should be awarded the picture, at which time he was advised that Stanley Warner, knowing that Mr. Diamond—

> Mr. Ward: If Your Honor please, just a second. Mr. Wren said he was there at the headquarters of Twentieth Century-Fox. It has not been shown that he was a party to the conversation. I don't think it would be admissible.

By Mr. Sawyer:

Q. Just say what Mr. Bettinger said.

A. Mr. Bettinger told me that Stanley Warner had sent their offer directly to New York by wire.

Q. Did you make any response to that, and, if so, what?

A. I did. I told him I would like to see the time that the wire was sent and received by Twentieth Century-Fox, and he thought that was a very reasonable request.

(902)

Q. Then what happened?

A. There was quite a few discussions with New York, his immediate superiors in New York, on the telephone, and that lasted from about a quarter of 11:00 up until about 12:45 P.M., at which time Mr. Bettinger told me that Stanley Warner was sending their written offer over to the local Twentieth Century-Fox branch, and at approximately 1:00 o'clock Mr. William Yurasko of Stanley Warner's local office came in with what he said was the Stanley Warner bid.

Q. To whom was the picture awarded?

A. To the Stanley Warner Mastbaum Theatre.

Mr. Sawyer: I ask to have this marked as P-158.

(A carbon copy of a letter dated August 31, 1955, addressed to Mr. Sam Diamond was marked for identification as P-158.)

By Mr. Sawyer:

Q. I show you a document that has been marked P-158 and ask you what that is.

A. It is the written bid submitted by the Viking Theatre to Twentieth Century-Fox.

Q. For what picture?

A. Referring to the motion picture LEFT HAND OF GOD.

Q. Was that the bid as it was submitted by you on this

(903)

particular morning that you have spoken of?

A. It is a copy of it, yes, sir.

Q. Is there a guarantee offered by the Viking?

A. $27,000 minimum guarantee.

Q. What are the rental terms?

A. The distributor's share of the gross receipts during any week computed separately and not cumulatively, shall

be 90 per cent of the gross receipts after deducting $5,000 weekly operating expense, cost of Fox News and shorts during the exhibition not to exceed $175 per week, the cost of any additional help or overtime designed to produce additional revenue at the box office, regardless of whether such additional revenue is produced, guaranteed to cover the entire engagement. The picture was to play a minimum of four weeks and open approximately on availability. There was a hold-over clause—there were hold-over clauses as well.

Mr. Nizer: What about advertising?

Mr. Sawyer: Again, Your Honor, this document will be offered, the two and a half pages, the entire thing will be offered.

Mr. Nizer: But it is only two lines, the advertising clause.

Mr. Sawyer: Two lines? Let's see it.

Mr. Nizer: It is only a couple of lines.

(904)

Mr. Sawyer: That varies from the advertising clause previously read, Your Honor. I didn't realize that.

By Mr. Sawyer:

Q. Will you read the advertiing clause, too, Mr. Wren?

A. The advertising. The distributor to pay the entire cost of all forms of advertising, publicity and exploitation, used prior to and during the engagement. This includes rental and painting of four centrally located billboards and rental of 15 centrally located 28 sheet boards.

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(906)

By Mr. Sawyer:

Q. With respect to the motion picture GENTLEMEN MARRY BRUNETTES, did the Viking bid on that?

A. Yes, sir.

The Court: What distributor?

The Witness: United Artists.

By Mr. Sawyer:

Q. I show you a document that has been marked previously as P-82 and I ask you what those documents are.

A. The top letter is a notification from the United Artists Corporation dated September 24, 1955, saying:

> This is to advise you that your bid on GENTLEMEN MARRY BRUNETTES has been rejected and the picture has been awarded by the producer to your competitor, the Stanley Theatre, Philadelphia.

Q. What is the accompanying document?

(907)

A. The next document is page 2 of United Artists Corporation Competitive Bid Application covering motion picture United Artists release GENTLEMEN MARRY BRUNETTES, which contains the Viking Theatre's offer for GENTLEMEN MARRY BRUNETTES.

Q. I see. What was the offer made by the Viking?

A. The number of consecutive dates, two weeks, that the picture is made available on or before September 22. If second week's gross equals or exceeds $10,500 picture will be held for a third week.

Q. Terms?

A. The terms are attached to page 2 of United Artists competitive bid application.

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The film rental. The distributor's share of the gross receipts during any week computed separately and not cumulatively shall be 90 per cent of the gross receipts after deducting $4970.19 weekly operating expense, cost of news and shorts shown during the exhibition not to exceed $150 per week; cost of any additional help or overtime.

Distributor to pay the entire cost of all forms of advertising, publicity in exploitation used to and during the engagement.

This includes rental and paying of four centrally located billboards and rental of fifteen centrally located 28 sheet boards.

Q. Was the Viking awarded that picture?

A. No, sir, it was not.

Q. To whom was the picture awarded?

A. The Stanley Theatre.

Q. Now, Mr. Wren, with respect to the picture SEVEN CITIES—is it SEVEN CITIES OF GOLD?

A. SEVEN CITIES OF GOLD, a Twentieth Century-Fox release.

Q. What was the situation with respect to that motion picture?

A. We were in need of a picture to play at the Viking Theatre and we advised Fox that we would be interested in

(909)

negotiating for the picture.

Q. Advised whom?

A. Twentieth Century-Fox, the local branch. And after advising them of that we contacted Mr. Harold Seidenberg, who at that time was the managing director of the Fox Theatre of Philadelphia, who was in a convention at San Francisco, the National Theatres Convention.

We contacted Mr. Seidenberg to ask if he would need the picture. He said no, but I have to check with my su-

periors. He called me back at my home to tell me that while he didn't need the picture his superiors told him to bid on the picture.

Q. What was Mr. Seidenberg's job?

A. He was the managing director of the local Fox Theatre, a National Theatre, 16th and Market Streets.

Q. And did he bid on the picture?

A. He did.

Q. Was he awarded the picture?

A. He was.

Q. Did the picture play at the Fox Theatre?

A. It did.

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(913)

Q. Did the Viking bid on DESPERATE HOURS, Mr. Wren?

A. We did.

Q. What happened then?

A. The offer was rejected.

Q. By whom?

A. Supposedly by Mr. E. K. Ted O'Shea, who at that time was the sales manager, headquartered in New York, for Paramount Pictures.

Q. In what fashion was it rejected? Did you receive a notice, a letter, or what?

A. I assume we received a notice, but in addition to that I got a call from Mr. Ted O'Shea telling me that we were not going to get the picture, that he had promised the picture.

I said, Well, what happens to us?

(914)

He said, "Don't worry, your turn will come.

Q. Where did the picture actually play?

A. At the Midtown Theatre.

Q. What was the bid?

Mr. Sawyer: I am just getting it now, Your Honor. This is the Viking Theatre.

I would like to have this marked P-159.

(Bid of Viking Theatre on DESPERATE HOURS was marked Plaintiff's Exhibit 159 for identification.)

By Mr. Sawyer:

Q. Now I show you documents which have been marked P-159 and ask you what they are.

A. The first document is a Paramount Film Distributing Corporation request for offer dated 9/14/55, covering THE DESPERATE HOURS, available on or about 10/19/55, and the rider or the attachment gives the terms offered for THE DESPERATE HOURS by the Viking Theatre; namely, 90 per cent of the gross receipts in excess of $5000. Any overtime incurred is to be added to the basic expense of $5000 before computing the distributor's 90 per cent of the gross receipts over the aforementioned expenses.

The distributor to pay all advertising, including four painted billboards and fourteen 28 sheets,

(915)

totaling $1344.75 for the first month, rental of painted billboards and 28 sheet boards to be prorated in the event that the picture is held for additional weeks. Distributor also to pay for lobby display pieces and valance not to exceed $450.

Q. Is there a clause with respect to playing time?

A. An unlimited run. Termination of engagement to be mutually agreed upon.

Q. Was that bid withdrawn by the Viking Theatre?

A. No, sir.

• • •

By Mr. Sawyer:

Q. Now, with respect to the picture TALL MAN [sic. TALL MEN], who distributed

(916)

that picture?

A. Twentieth Century-Fox.

Q. Did the Viking seek to obtain that picture?

A. We did.

Q. Did it bid on it?

A. Yes.

Q. Viking Exhibit P-137.

• • •

Mr. Sawyer: Do you mean the deposition No. 124? Yes, it is.

By Mr. Sawyer:

Q. I show you documents that have been marked P-137. Is the Viking bid among those documents?

A. Yes.

Q. What terms were offered by the Viking for that picture?

A. First week—50 per cent to $30,000, and 66-2/3 per cent over $30,000.

Second, third and fourth weeks—40 per cent to 50 per cent sliding scale.

Playing time:

Four weeks. To follow THE BIG KNIFE which is scheduled to open at the Viking Theatre on or about November 2, 1955.

If the third week's gross receipts equal or

(917)

exceed $16,500, the picture will be held for a fifth week.

If the fourth week's gross receipts equal or exceed $13,500, the picture will be held for a sixth week.

Distributor to pay 50 per cent of the cost of all advertising over and above the regular house budget of $400 per week.

Advertising schedule must include the painting and rental of four billboards and rental of 14 twenty-eight sheet boards at a total cost of $1344.75 for the first month of the engagement as well as lobby display pieces and valance not to exceed $450. Rental of painted billboards and 28 sheet boards to be prorated in the event the picture is held for additional weeks. And attached is our sliding scale.

Q. Was the bid accepted?

A. No, sir.

Q. Where did the picture play?

A. The Fox Theatre Philadelphia.

Q. Now, at this point, up to this point, Mr. Wren—when I refer to this point, I am referring to approximately September of 1955; is that correct, are we at that point?

A. Yes.

(918)

Q. Now, at this point had the Viking Theatre played any Universal pictures?

A. No, sir.

Q. Had the Viking Theatre submitted bids on any Universal pictures?

A. We were never afforded the opportunity to submit offers.

Mr. Nizer: I move to strike that.

Mr. Sawyer: Yes, that is right.

By Mr. Sawyer:

Q. Had you submitted any bids?

A. No.

Q. Had you made any effort to obtain Universal product?

A. We had.

Q. What effort—not what effort was made by the Viking prior to your coming, but what efforts if any did you make to obtain Universal product?

A. Well, when I took over the managerial duties and the buying and booking for the Viking in March of 1955, I contacted Mr. Edward Heiber, the Universal branch manager.

Q. Of what?

A. Of Universal International Pictures, and asked—

Q. Where was his office?

A. At 13th and Vine Streets in Philadelphia.

Q. Mr. Heiber?

(919)

A. That is right—H-e-i-b-e-r.

Q. Proceed.

A. And asked why we are not afforded an opportunity to bid or negotiate or make offers for Universal product, and he told me that at that time their product had been sold through October, 1955. In about April, about a month later, they invited me to a screening of FOX FIRE, which I went to see, and at that time he suggested that I go to New York to contact Mr. Peter Dana, who was the division manager for Universal Pictures, and made his headquarters in New York, and speak to him with reference to Universal product. And the bid that we submitted on FOX FIRE was the result of my meeting with Mr. Dana.

Q. The one that you testified about this morning?

A. That is right, which we withdrew later.

Subsequently we screened a picture called ALL THAT HEAVEN ALLOWS with Jane Wyman and Rock Hudson.

At the conclusion of the screening I went to Mr. Heiber's office and told him we were interested in the picture.

Q. Was there anybody with you?

A. Yes, Mr. Harry Sley.

Q. All right. Was Mr. Sley along for the screening?

A. Yes.

(920)

Q. All right, proceed.

A. We told Mr. Heiber that we were interested in the picture and he suggested that we arrange to go to New York with him and see Mr. Dana.

We arranged the appointment and wrote to New York —went to New York on the train with Mr. Heiber, and that was the first week in September, and when we got to Mr. Heiber's office we told him we were interested in ALL THAT HEAVEN ALLOWS, that we had screened the picture and liked it very much, and we wanted to buy it for the Viking Theatre.

At which time Mr. Dana told us that he had four pictures for the Viking Theatre, and at that moment signaled to his secretary with a buzzer he had on his desk, who came into his office with a list of four Universal atfractions on a piece of paper.

Mr. Sawyer: This is P-152.

By Mr. Sawyer:

Q. I show you a document that has been marked P-152 and ask you if that is a photostatic copy of the document that Mr. Dana's secretary brought in to him.

A. It looks like it. It is.

Q. All right. Proceed.

A. On the list was the SECOND GREATEST SEX, a CinemaScope picture in Technicolor, starring Jeanne Crain, George Nader,

(921)

Kitty Kallen, Bert Lahr.

Q. Are you reading from the list now?

A. Yes.

Q. Go ahead.

A. Which in typewriting here says December, 1955, but which we were advised was available for Thanksgiving, and which we have penciled here, Thanksgiving, 1955. November 16 or Thanksgiving.

A January release known as ALL THAT HEAVEN ALLOWS, a Technicolor picture with Jane Wyman, Rock Hudson, Agnes Moorehead, Conrad Nagel, and Charles Drake.

A February, 1956 release, THERE'S ALWAYS TOMORROW, with Barbara Stanwyck, Fred MacMurray, and Joan Bennett.

A March, 1956 release, entitled NEVER SAY GOOD-BY, in Technicolor, with Rock Hudson, Miss Cornel Borchers, George Saunders, and Ray Collins.

Q. What was the discussion?

A. Mr. Dana told us that the four pictures were for the Viking Theatre, and we told him at the time that we came in to buy ALL THAT HEAVEN ALLOWS.

He told us that he wanted us to take the four pictures for the Viking Theatre.

We told him we were not interested in the

(922)

pictures. I had seen THE SECOND GREATEST SEX, Mr. Sley had not seen THE SECOND GREATEST SEX. All he had screened was ALL THAT HEAVEN ALLOWS. We had not seen THERE'S ALWAYS TOMORROW, and we had not been afforded an opportunity to screen NEVER SAY GOOD-BY. He knew our policy of not going after pictures that we had not had an opportunity to screen.

Mr. Ward: That is objected to, if Your Honor pleases, what Mr. Dana knew. I think we must limit this to what was said.

The Witness: We were opposed to buying pictures—

Mr. Ward: Just a minute.

The Witness: I am sorry.

The Court: Did you say to Mr. Dana why?

The Witness: Yes, sir. We only submitted offers for pictures which we had screened.

He told us that there was no problem with these pictures at all, that he knew the Viking Theatre and that he thought THE SECOND GREATEST SEX, ALL THAT HEAVEN ALLOWS, THERE'S ALWAYS TOMORROW, and NEVER SAY GOOD-BY were ideal for the Viking Theatre and was most interested in making a deal with us, a package deal for the four pictures.

(923)

Mr. Ward: If Your Honor please, I object to that and I ask that that be stricken as a conclusion and a summary of the witness as to what the conversation was.

The Court: Is that what he said?

The Witness: Yes, sir.

Mr. Ward: Do you represent that as what the man said to you?

The Witness: Yes, sir.

Mr. Ward: That is all I want to know.

By Mr. Sawyer:

Q. Proceed, Mr. Wren.

A. He told us that the SECOND GREATEST SEX would be available at the latest Thanksgiving, that the availability there of January was all right for ALL THAT HEAVEN ALLOWS, February 1, THERE'S ALWAYS TOMORROW, and March 1, NEVER SAY GOODBYE, and asked that we sit down at the end of his desk and work out a deal, at which time Mr. Heiber, the local branch manager, who was in the office with us, turned to Mr. Dana—well, Mr. Dana turned to Mr. Heiber and said, "Eddie, what are your

thoughts on the package?" and he said, "I would say $130,000," and Mr. Dana pooh-poohed the idea. He said, "Eddie, you know they are not worth that kind of money."

Mr. Dana then suggested $90,000 or $93,000, somewhere in that vicinity.

(924)

Q. What do you mean, $90,000?

A. For the package, a guarantee against—

Q. All right.

A. Mr. Sley and I worked at the end of Mr. Dana's desk, and at the conclusion of some three or four hours of negotiation, we arrived at a price on SECOND GREATEST SEX at $17,500, $27,500 for ALL THAT HEAVEN ALLOWS, and $22,500 for NEVER SAY GOODBYE. The entire package came to $85,000.

We told Mr. Dana we thought the price was prohibitive, and he assured us constantly that Universal does not want blood money, "If you take this package of pictures with this $85,000 guarantee, I can assure you that Universal does not want blood money, if you are hurt in any way, you come back and see me and I will make sure that you are not hurt. And, the reason that I have to have the guarantee—"

We called to his attention the fact that we know of no other pictures in Philadelphia, any other exhibitor giving a guarantee, he said, "I must have some reason to go back to Stanley Warner and Goldman and tell them why you got those pictures. I have no performance on your house," and we asked him at that time, "At what theatre did you have performance before you sold them pictures?"

It was quite obvious to us that you can't have

(925)

performance till they play a picture, and at that time he could not recall any guarantees, at the Goldman Theatres or the Stanley Warner Theatres, where they had guaranteed him money before they played their product, the Universal

product, so we left his office with the understanding that if we took these four pictures of the package for $85,000, and the terms were to be 90 over $4,975, an amount set up by Mr. Dana, the $4,975, that Universal would pay all of the advertising, that Universal was stipulating it would be an indefinite run, at their discretion, to take on or off the pictures, and that we were assured we would get SECOND GREATEST SEX for Thanksgiving playing time.

But we had to promise Mr. Dana—Mr. Dana asked at the time if we would promise him not to bid for any more pictures as long as we had that product, that there was no need for us to seek other pictures anywhere.

We told Mr. Dana that we would not give up our right to bid for motion pictures because of this or any other deal that we made. If we saw suitable product we were going to make offers for them, and we indicated that by playing a picture at Thanksgiving on the caliber of the SECOND GREATEST SEX, which we referred to at the time as the poor man's SEVEN BRIDES FOR SEVEN BROTHERS, that we would have open playing time, and we would not lock ourselves out on the

(926)

bidding for other product.

Q. Why would you have open playing time?

A. Because the SECOND GREATEST SEX on paper with this cast didn't look like it could play from Thanksgiving through January, a period of five or six weeks.

He assured us when we gave him that understanding, we told him, "We will not take the package if you are going to keep us from bidding."

He said, "All right, forget that. You take the package, but you are not to advertise these pictures in any manner whatsoever until I have cleared this matter with Mr. William Goldman and with the Stanley Warner chain in Philadelphia."

We agreed to that.

When we got to Philadelphia, in a matter of two or three days, Mr. Edward Heiber, the local Universal branch manager, phoned me to tell me he had very bad news, that the SECOND GREATEST SEX was not available for Thanksgiving; that the National Screen Service Company—who, incidentally, make trailers, the type of short films, which you see on the screen, announcing coming attractions, and also make advertising material such as 40 x 60's, one sheets, stills, photographs, and the like—that the advertising materials for the SECOND GREATEST SEX would not be ready in

(926a)

time for the Viking to play the SECOND GREATEST SEX starting Thanksgiving, and that we would have to put it back until Christmas.

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(928)

Q. With respect to Mr. Dana's instructions to you not to advertise the motion picture until he had a chance to clear the matter with William Goldman, did you have any subsequent meetings with Mr. Dana on that point?

A. Yes.

Q. Proceed. What was said at any such meeting by you, and what was said by him?

A. Mr. Dana told me at breakfast at the Warwick Hotel that he was going to Mr. Goldman's office with Mr. Heiber to tell Mr. Goldman of the sale of these four pictures to the Viking Theatre, and that at the conclusion of the meeting he was going to Stanley Warner, and after he had advised them of the sale of these four pictures, he would phone me to let me know that it was perfectly all right whether to advertise the pictures or not.

Q. Did he do so?

A. He did.

Q. Were you then permitted to advertise them?

(929)

A. Yes, sir.

Q. Did you get SECOND GREATEST SEX for Thanksgiving?

A. No, sir, we did not.

Q. What picture did you show at Thanksgiving that year?

A. The BIG KNIFE.

Q. Now, on these pictures, will you proceed to tell us what happened with respect to these pictures? What happened in terms of whether the Viking played them or not, and, if so, what the outcome of that was.

A. Well, we played the SECOND GREATEST SEX at the Viking Theatre for a Christmas attraction.

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(966)

Mr. Nizer: Just a moment. I will cite to you your own admission in a minute, it is being found, that block booking is not an issue in this case.

Now, let me make clear as to how this is an illustration of an attempt to stretch the rubber band beyond the breaking point.

The witness's testimony itself indicates that he had not had any opportunity, according to him, to get Universal pictures. He goes to New York, he goes out of his way, it is true, he goes with respect to one picture, but when they offer him the four there are three and four hours of negotiation in which they bargain price. They ask for a certain amount, he cuts them down. The

(967)

testimony is that even the other side says, that is too high, which is being quite fair, it is a funny way of compulsion.

The admission that Mr. Sawyer made—I don't mean the admission in an invidious sense, his statement to the Court: There isn't anything about block booking in this case. At page 486.

Mr. Sawyer: May I state that that was in error, and the pretrial memorandum specifically has in it as one of the items in this case the fact that the Viking Theatre was compelled to take these three pictures in order to get ALL THAT HEAVEN ALLOWS. So it is right in the pretrial, Your Honor.

Mr. Ward: Your Honor, the evidence shows that there were separate considerations agreed upon for each film, and the subjective term "package" is simply loosely used here.

Mr. Nizer: To claim that this is a block-booking case would result in a trial on another issue—

Mr. Sawyer: This is one instance, Your Honor, of block booking in the case. This is not a block-booking case, in that sense that is true, because it is only one, it is the only instance in the case.

Mr. Nizer: That is not what you said.

(968)

Mr. Sawyer (continuing) In which there is block booking, and this is not really a block-booking case, that I will agree with.

This is one instance in which the realities of that meeting in New York, as Mr. Wren testified, we were badly in need of a picture, is that you take a package, and that is what Mr. Dana told him. He said it was a package, and it is obvious, so obvious, that they either took those four or they didn't get the one.

Mr. Nizer: Let us assume even that is so, suppose even that were a violation—let us assume you had a block-booking violation on that deal—what has that got to do with this case? Then you and Universal have a dispute with respect to it. As a matter of fact, you tried out that dispute, didn't you? Did you put in that defense that it was block booking?

Mr. Sawyer: Why, certainly, and you know what happens in the state court. As a matter of contract law—

Mr. Nizer: No, no.

Mr. Sawyer: (continuing) if it were illegal the Court said that this is the kind of issue, and antitrust offenses, that you have to litigate in the Federal courts.

Mr. Nizer: No, not antitrust.

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(972)

Mr. Sawyer:

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(975)

The distributors, we say, Your Honor, the nature of the conspiracy was, a conspiracy so that at every turn, whatever that method that was best suited to that distributor, and whenever an opportunity presented itself, it discriminated in this sense: It treated the Viking differently than it treated others.

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(981)

There are two sides to this we all agree that we have to show. First, we have to show that, well, put it the way Mr. Nizer refers to it, he says you have to show you are damaged first. So I will take it that way. We were going to show conspiracy first. He said first you show you were damaged, then you have to show you were damaged not as a result of outside coincidental factors, no, sir, it has to be as a result of conspiracy. Mr. Nizer said, "How can you evaluate these things? They are difficult to evaluate." They are. In a case where a man comes in on one picture, as the case before Judge Kraft, and he says his bid is better, no court, of course, is going to interfere on one particular bid. But what the question will have to be is:

(982)

Could these decisions cumulatively all have been the result of mistaken business judgment. We contend that if the people made these many mistakes in business judgment unintentionally and without economic motivation, these film companies would have been out of business long ago, if they can't pick bids any better than that. Not every bid. We will compare every single bid including two or three where in our judgment the bid of the opposition was better. The picture was properly awarded. They made a better bid. No question about it. In one case, a higher guarantee by 2,500; our, 80,000 against somebody's 82,500. We don't select the ones. We will take every one and we will be able to demonstrate. Some of them are close, some of them are manifest. The question will be in all of these pictures, could it possibly be—this is only one aspect to the conspiracy—could it possibly be that on all these pictures, these people with their bidding departments in New York who analyzed these bids supposedly and evaluated them, could they possibly have made this many misjudgments. The misjudgment being as follows: They are entitled to make some, there is no question about it. It would take a genius, someone who does not exist, plus a computer never to make a mistake in awarding a bid and to never have a

(983)

situation where the bid they awarded on turned out to return them less film rental than if they would have picked another theatre. But if in instance after instance, time after time after time they somehow succeeded in awarding the picture to a theatre which, as it turns out, returned them less film rental than they would have gotten had they accepted our bid, then something must be wrong. At least, that is *one* element

of the conspiracy. Remember, this is only one element even yet, this difference in bid.

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(997)

Mr. Sawyer: We agree with that. A 90-10 bid is a very good bid for the distributor, for a big picture.

Mr. Nizer: For a successful picture.

Mr. Sawyer: If it is going to be a poor picture, it is a good, safe bid for the exhibitor.

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(1009)

EIGHTH DAY

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(1010)

The Court: Will counsel approach side bar, please.

(The following transpired at side bar:)

The Court: Gentlemen, last night we argued a few points of law with respect to the case, but at the conclusion I said that I would consider the briefs and the arguments with respect particularly to the question as to what evidence the plaintiff can introduce as to which pictures he did not bid. In other words, whether the plaintiff can show that while he did not bid on certain pictures they were awarded to other distributors and the plaintiff contends that he was damaged, since he was deprived, as he argues, of those pictures.

I have considered both briefs and the cases.

I rule as follows on that point:

That plaintiff should not be allowed to introduce evidence relating to the superiority of pictures awarded to other exhibitors when the plaintiff itself did not bid or attempt to bid on these same pictures, unless it can show that it was conspiratorially prevented from so bidding.

The plaintiff in my judgment has no standing to complain about or to point to pictures on which it

(1012)

did not seek to bid.

Although this precise point has not been raised heretofore in a similar case to the present one, to me the rationale of the authorities submitted by the defendants is clearly applicable. The plaintiff has not submitted any decided cases in its favor, but has attempted in its brief to distinguish the defendants' cases.

As I see it, the thrust of the plaintiff's argument depends upon allegations of deprivation of product and resultant harm therefrom. Evidence concerning pictures on which plaintiff did not bid would be irrelevant to sustain the essential proposition of the plaintiff's contention, since one cannot be deprived of a product which he did not attempt to secure and on which presumably he had the same opportunity to secure as other exhibitors....

If this Court were to accede to the plaintiff's position, it would impose a heavy and unnecessary burden upon all persons concerned with this litigation. For example, as I see it, the Court would have to concern itself with questions of corporate business judgment, the award of the pictures to other exhibitors, the extent of the bids, whether they were good or bad pictures,

(1013)

how many were successes, how many were failures, how much was made on some, how much was lost on others, the admissibility thereof and the justification therefor, along with the accompanying proof which might conceivably take the form of a picture by picture analysis and treatment by defendants.

In addition to these burdens, the plaintiff's position would inject additional factors, lacking probative

value, which would tend to confuse the jury in a case which is already assuming a highly complex coloration. Accordingly, I rule that plaintiff can only produce proof of the licensing of pictures to other exhibitors on which he did not bid, if he proves also that he was conspiratorially prevented from bidding on such pictures.

Do you understand that, gentlemen?

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(1014)

JAY WREN—resumed.

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Mr. Wren, you were talking about the motion picture SECOND GREATEST SEX. After that availability was changed from Thanksgiving what did you do about the Thanksgiving showing?

A. We had to bid—we had to go out and get another picture to play for Thanksgiving.

Q. What was the picture, and what were the circumstances?

A. Well, we had but two days to get the picture, and we bid for it, got THE BIG KNIFE, a United Artists release.

Q. Under what terms?

A. $22,500 guarantee and a percentage.

Q. Was that a successful engagement?

A. No, sir, it was not.

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(1015)

The Court: You asked whether it was successful or not. As I understand it, Mr. Sawyer, Mr. Wren

testified, according to my recollection, that nobody knows whether or not a picture is going to be successful until it is played.

Mr. Sawyer: Well—

The Court: Then you can tell by the number of people who come in and the box office receipts. In other words, a producer makes a picture. He thinks it is going to be successful, and it turns out to be perhaps very

(1016)

unsuccessful, literally a flop, so to speak.

Now, the same way with an exhibitor. He views it. He looks at it. They compete. Some exhibitor thinks that it is going to be very successful, so in theory he bids more. Then it turns out to be unsuccessful. That is not unusual, apparently, the way I understand it.

I will sustain the objection.

Mr. Sawyer: Your Honor, may I correct Your Honor in one respect?

The Court: Yes, surely.

Mr. Sawyer: I don't believe that Mr. Wren said you can never tell whether a picture is going to be successful or not. I don't think there is any such statement of his.

We agree, Your Honor, that nobody can accurately and each time predict what a motion picture will do, but we also say that it is self-evident that a really top picture that has had months of advance build-up, national advertising, with top stars in it, is bound to do better than a picture nobody ever heard from, and that you know a week before, and that sometimes pictures have played parts of first runs or all of first runs in

other cities, and once that has happened you can make a very good estimate.

The point of this, Your Honor, is that it

(1017)

isn't a question of what he thought. The testimony is that he had to have a picture and that he might not have had any thought that the picture could earn his guarantee.

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Q. Mr. Wren, did you earn the guarantee on this picture?

A. No, sir, we did not.

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(1019)

Q. Did you ask for an adjustment on the picture, Mr. Wren?

A. Yes, sir.

Mr. Ward: Objected to, if Your Honor please. I object to that question.

The Court: What was the question, please?

(The last question and answer were read aloud by the reporter.)

The Court: I will overrule the objection.

By Mr. Sawyer:

Q. You may answer.

A. Yes, sir.

Q. Who did you ask, and under what circumstances?

A. Mr. John Turner, who at that time was in charge of the local branch.

Q. Of what company?

A. Of United Artists Corporation.

Q. What happened?

A. Mr. Turner told me that he would get me the adjustment

(1020)

and later advised me that his New York office had turned down the request.

Q. Did you ever get any adjustment on it?

A. No, sir.

Q. Now, again with respect to the four Universal pictures, and I refer again to those pictures listed on P-152. You told us that you played SECOND GREATEST SEX. Did you play the other pictures, and, if so, in what order did you play all of those other pictures ultimately?

A. Yes, sir.

(1021)

Q. What was the next one chronologically that you played?

A. ALL THAT HEAVEN ALLOWS.

Q. Was that a picture that you had screened?

A. Yes, sir.

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Q. Did you play THERE IS ALWAYS TOMORROW?

A. Yes, sir.

Q. Did you ask for an adjustment on that picture?

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A. We asked for an adjustment on the entire package as we were advised to do. We were told by Mr. Dana that if after playing these four pictures we had lost money—

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(1022)

Q. Did you ask for an adjustment on THERE IS ALWAYS TOMORROW?

A. Yes, sir.

Q. Did you ask for adjustment on NEVER SAY GOODBYE?

A. Yes, sir.

Q. What was Mr. Dana's response to your request?

A. Mr. Dana told us that he would offer us from the outset $15,000, and we explained to him that it certainly would not come anywhere near covering the losses we have sustained on these pictures as a result of putting up the $85,000 guarantee. He told us that he would take it up with his Statistical Department to see if he could not arrive at a larger figure....

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(1025)

Q. Now, Mr. Wren, regarding the picture AWAY ALL BOATS did the Viking obtain that picture?

(1026)

A. No, sir.

Q. Was that picture discussed with anyone? Who was the producer of that picture?

A. Universal International.

Q. Was that discussed with anyone at Universal? If so, with whom and what was said about it?

A. At the time we signed the agreements for these four pictures from Universal, that is, SECOND GREATEST SEX, THERE IS ALWAYS TOMORROW, ALL THAT HEAVEN ALLOWS, and NEVER SAY GOODBYE, we inquired as to a production of Universal which they were going to release known as AWAY ALL BOATS. We were told it was in production but if and when it was completed it would be given to the Viking Theatre with no guarantee.

Q. What was the next you heard, if anything, about AWAY ALL BOATS?

A. That it had been given to the Goldman Theatre.

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(1054)

Q. Mr. Wren, who distributed the motion picture PICNIC?

A. Columbia Pictures.

Q. Was the Viking interested in obtaining that picture?

A. We were.

Q. Who was in that picture?

A. William Holden, Kim Novack, Arthur O'Connell. They were the principals.

Q. Had there been advance national advertising on that picture?

A. Yes, sir.

Q. Did the Viking bid?

A. Yes, sir.

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(1057)

Q. Where did the picture play?

A. At the Randolph Theatre.

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(1058)

Q. With respect to this motion picture, Mr. Wren, did anybody from Columbia Pictures ever approach you in any way about negotiating for this motion picture after your bid was rejected?

A. No, sir.

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(1059)

Q. Now, with respect to the picture, Mr. Wren, COURT JESTER, who was the distributor of that picture?

A. Paramount Film Distributing Corporation.

Q. Was the Viking anxious to obtain that picture?

A. Yes, sir.

Q. Who was in it?

A. Hope, Bob Hope. He was the principal player.

Mr. Ward: I didn't hear you. Who did you say, Bob Hope?

The Witness: Bob Hope. I am wrong. That was a Danny Kay picture?

By Mr. Sawyer:

Q. Now, did the Viking bid on that picture?

A. Yes, sir.

Q. I show you a document which has been marked as P-18 and

(1060)

as you what it is. I also ask you to read it.

A. Paramount Film Distributing Corporation Request for Offer covering THE COURT JESTER. Be advised it is available on or about February 2, 1956.

It contains the offer submitted by the Viking Theatre for the picture THE COURT JESTER.

A minimum of two weeks with a possible hold-over to be mutually agreed upon. Adult evening admission price you choose to charge during the engagement.

We stated $1.49. The terms offered are on the attached rider as are the amounts proposed for advertising and the clearance.

The rider which was attached reads:

Rider for THE COURT JESTER bid due December 13, 1955.

Terms Offered: 90 per cent of the gross receipts in excess of $5000. Any overtime incurred is to be added to the basic expense of $5000 before computing the distributor's 90 per cent of the gross receipts over the aforementioned expense.

Distributor shall pay all advertising costs for the engagement including:

(a) Pre-opening and first week—All advertising including teaser and first week's newspaper ads and the

(1061)

necessary engraving; radio and TV announcements; painting costs and rental of five painted billboards and daters as well as rental or 15 twenty-eight sheet boards not to exceed $1492.25; all lobby and front displays and marquee valance not to exceed $450; exploitation, etc.

(b) Subsequent weeks—All newspaper advertising and engravings; weekly rental for five painted billboards and 15 twenty-eight sheet billboards as well as an additional radio and TV announcements; exploitation, etc.

There is attached a clearance schedule.

Q. Now, was that bid rejected, Mr. Wren?

A. Yes, sir.

Q. Subsequent to its rejection did anyone from Paramount approach you with respect to negotiating for the picture?

A. No, sir.

Q. What was the next thing you knew with regard to the picture THE COURT JESTER?

A. The picture had been awarded to William Goldman Theatres.

Q. Do you know at which William Goldman Theatre?

A. The Midtown.

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(1063)

Mr. Ward: Just one second, Your Honor, I did not want to interrupt while Mr. Sawyer was reading. Do we understand that the answers to interrogatories that were read of Paramount are offered only as to Paramount?

Mr. Sawyer: As to Paramount and Goldman, Your Honor.

Mr. Rome: I take it that you are referring to the answer of Goldman being introduced as to Goldman.

Mr. Sawyer: No, sir, the answers to Paramount are introduced as to Paramount and Goldman, and the answers of Goldman are introduced as to Paramount and Goldman.

It respects dealings between the two parties, Your Honor.

Mr. Ward: Sir, Paramount cannot be bound by by answers made by Goldman in this proceeding. I have no objection to the reading of the answer of Paramount to the interrogatory to it. We are not bound by the admissions of other parties defendant.

Mr. Rome: And, similarly, sir, we cannot be bound by the answers of Paramount.

Mr. Sawyer: The admission rule, I believe, Your Honor, is that where the admission is offered, it comes in first of all as the admission of the party making it, and

(1064)

wherein a conspiracy case it deals with dealings between the two parties, two of whom are named as conspirators, then it comes in as a declaration of a co-conspirator, subject, of course, as all of this is, to Your Honor's ruling at the end as to whether or not this has been connected up. This is not a case where you have one admission over here, which I ask to be admitted as to all subject to being connected up, because this is as to an arangement between the two respecting a picture on which the Viking bid. I think it clearly comes in, subject to connection, as to both at this point. It does not come in at this point as to Universal, United Artists or Columbia, for instance.

Mr. Ward: I am sure, sir, that I do not have to instruct Your Honor on the meaning of the co-conspirator rule. The difficulty with Mr. Sawyer's position is that he is lifting himself with his bootstraps. Certainly at this juncture of the case these answers are admissible only as to the parties who made them, and not as to any other parties.

Mr. Rome: I join in that, sir.

The Court: Overruled.

Mr. Sawyer: Now, the admission, on request of Paramount, with respect to the picture COURT JESTER:

(1065)

The Viking offered a film rental of 90 per cent of the gross receipts, after deducting $5,000, plus overtime, each week, distributor to pay all advertising, and a minimum run of two weeks.

Admitted.

(e) William Goldman Theatres, Inc., did not submit—

Oh, excuse me, I read that before.

(g) On January 20, 1956, we negotiated a license for the picture at Midtown Theatre with William Goldman Theatres, Inc., at a film rental of 50 to 65 per cent for the first week on a sliding scale and 25 to 65 per cent on a sliding scale for the succeeding weeks, for a minimum run of four weeks.

Denied.

Prior to January 20, 1956, this defendant negotiated with William Goldman Theatres, Inc., and others for the licensing of the motion picture COURT JESTER, and on January 20, 1956, the result of these negotiations were transmitted by the Philadelphia

Branch Manager of this defendant to the defendant's New York Office.

The offer of William Goldman Theatres, Inc. was an indefinite run with a minimum of four weeks.

(1066)

50 per cent to 65 per cent sliding scale for the first week, 25 per cent to 65 per cent sliding scale for the succeeding weeks.

This motion picture was awarded to William Goldman Theatres, Inc. for exhibition at its Midtown Theatre on January 27, 1956.

(h) The picture played at the Midtown Theatre from February 3, 1956, to March 1, 1956, with a preview on February 2. It grossed $44,695.53, and you received a film rental of $15,834.02, which included an adjustment of $1,258.47. You paid back $4,901.57 to William Goldman Theatres, Inc., as your share of the advertising expenditures.

Paramount Film Distributing Corporation wishes to amend Paragraph 3(a) of its answers and objections to plaintiff's request for admissions filed on January 2, 1958, so as to admit, instead of deny, that an adjustment of $1,258.47 was granted on the COURT JESTER.

The reason for this is that the answer as given apparently was based on the language of the film rental credit form.

"Corrected film rental—$7,131.32," and incorrectly through a distinction between a correction and

(1067)

an adjustment. This matter was corrected by Ulrick Smith's testimony at despositions taken on November 20 and 23, 1958.

Mr. Ward: No objection to this, sir, in so far as Paramount Film Distributing Corporation is concerned.

I object to it with respect to the other distributor defendants which I represent.

The Court: Overruled.

Mr. Sawyer: I did not offer it—

The Court: Overruled. It is only being offered against the one, Paramount.

Mr. Ward: If that is so, then I withdraw the objection.

The Court: At least that is what he said, is it not?

Mr. Sawyer: Yes, sir.

The Court: Then why object as to the others?

Mr. Ward: I am sorry, Your Honor.

• • •

(1071)

Q. With respect to the picture SERENADE.
A. Yes, sir.
Q. Who distributed that picture?
A. Warner Brothers.

(1072)

Q. Did you screen it?
A. Yes, sir.
Q. With anybody else?
A. With Mr. Sley.
Q. What were you advised, if anything, and by whom, as to the availability of this picture?
A. At the conclusion of the screening Mr. Sley and I inquired—
Q. Let me interrupt you. Where did the screening take place?

A. At the old Warner Brothers projection room, and by that I mean where Warner Brothers were formerly located on 13th Street. They are now on Vine Street in new headquarters. They had a projection room there and we screened SERENADE.

Q. Would you continue, please?

A. At the conclusion of the screening Mr. Sley and I approached Mr. Mansell and Mr. Beilan and asked the availability of SERENADE, which starred Mario Lanza.

We were advised that SERENADE was an April 21st release, and we expressed interest in the picture for Easter, as we needed an Easter picture, and were told that MIRACLE IN THE RAIN was the Warner Brothers release.

Q. For what?

A. For Easter.

Q. All right, and on that basis, what happened, what action

(1073)

did you take, if any?

A. We submitted an offer for SERENADE, a three-week offer, with no cash guarantee, because of the availability, which they told us was April 21, or some three—

Mr. Goffman: I object to the reasons, Your Honor.

Mr. Sawyer: That is perfectly relevant, Your Honor, based on the representation made to him by a defendant.

Mr. Goffman: Your Honor, he has stated certain facts. His mental processes why he made bids or why he did not make bids are not relevant in this proceeding, Your Honor.

The Court: Well, if I understand, this officer told you certain things?

The Witness: Yes, sir.

The Court: What did he tell you?

The Witness: He told us that the picture would not be available for Easter, that the picture would not be available until some three or—or actually April 21.

The Court: SERENADE?

The Witness: That is right, sir.

The Court: And then when you got that information what did you do?

(1074)

The Witness: We submitted an offer of an availability of April 21st, and it did not contain a cash guarantee, it was a three-week offer.

Mr. Goffman: Your Honor, I object to what it did not contain. Probably it did not contain a whole lot of things. This witness is not entitled now to give reasons as to why he did or did not make bids. He did bid on it. It is there.

Mr. Sawyer: This is indeed a novel theory, Your Honor, that a witness is not entitled to give reasons.

The Court: Overruled. Ask another question.

By Mr. Sawyer:

Q. When was Easter that year?
A. The end of March. Wait. I think it was April 1st.

• • •

(1076a)

Q. Had SERENADE been available to you for Easter showing would it have been more valuable, the picture, Easter, than it would have been after Easter?

(1077)

The Witness: Yes, sir.

• • •

(1082)

Q. By the way, where did the picture play?
A. At the Goldman Theatre.
Q. Did you ever hear any more about it?
A. Yes, it opened March 30th at the Goldman Theatre.
Q. I mean with respect to your bid.
A. No, sir.
Q. Did it play the Goldman Theatre at Easter?
A. Yes, sir.

• • •

(1083)

Now, back to the answers to the requests for admissions of Warner Brothers.

With respect to the picture SERENADE, prior to accepting the offer of William Goldman Theatres, Inc., you did not offer to negotiate for the picture with the Viking or Arcadia Theatres and did not so negotiate.

The answer to 4(i):

This company has no record of oral negotiations with plaintiff or the operators of Arcadia Theatre subsequent to the receipt of their written offer for said motion picture. It does not believe any took place or that there was any attempt by any of the parties involved to bring about such oral negotiations.

4(j): The picture played at the Goldman Theatre from March 30, 1956, to May 1, 1956, grossed $61,903.23, and you received film rental of $23,786.93;

(1084)

you paid back $4,132.79 to William Goldman Theatres, Inc., as your share of advertising expenditures.

4(j) admitted, except that the motion picture was exhibited from March 31 to May 1, with a preview on

March 30; that the film grossed $61,703.23; that the film rental was $23,852.48, and except as qualified by paragraph 10 hereof.

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(1085)

The Court: Did you have any conversations with any of the officials of the company—what company was that?

The Witness: Paramount, sir.

The Court: Did you have any?

The Witness: Yes, I did.

(1086)

The Court: About what?

The Witness: About securing the TEN COMMANDMENTS for the Viking Theatre.

By Mr. Sawyer:

Q. What were the discussions and when did they take place, and where?

A. Mr. Charles Bosberg, who was in charge of sales at that time of the TEN COMMANDMENTS, which was being distributed by Paramount, came to Philadelphia, in the company of Mr. Howard Minsky.

Q. Who is Mr. Howard Minsky?

A. Mr. Howard Minsky at the time, I believe, was assistant to Mr. Waltner.

Q. What company?

A. Paramount. At that time he may have been District Manager, still for Paramount, headquartering here.

Q. This is the Paramount Mr. Minsky?

A. That is Mr. Howard Minsky of Paramount.

Q. Very well.

A. Mr. Bosberg, Mr. Minsky and I discussed the TEN COMMANDMENTS for the Viking Theatre, and we were

told we will not be able to screen the picture, and that the Viking Theatre was too small for the picture, that what they were looking for was a 1500-seat theatre, like the Goldman Theatre, and

(1087)

we told Mr. Bosberg that he had been misinformed, that the Goldman Theatre was not anywhere near 1500 seats, that it was closer to the size of the Viking than it was to the size of a 1500-seat theatre.

We had recalled—we had told him, rather, that the original TEN COMMANDMENTS had played the Aldine, which is now the Viking, some eight months, and he told us that the picture wasn't available, and we objected to bidding as a result of not seeing the picture, and furthermore they wanted a larger house of the 1500-seat size, and that is the last we heard with reference to the TEN COMMANDMENTS.

Q. Were you ever given any opportunity to bid or negotiate for the picture in any way?

Mr. Ward: Objected to, if Your Honor please. That is a conclusion. It is not only leading, but it also calls for a conclusion, and it also involves a double-barreled question. I ask that it be rephrased or redrawn.

Mr. Sawyer: Then I will read Paramount's answer to Interrogatory No. 5, request for admission 5(a).

Mr. Ward: Just one second. It is much easier to follow if we have our papers before us. You have yours available. Will you give us one minute to catch up?

Mr. Sawyer: Yes, as long as you are only asking for a minute.

(1088)

Mr. Ward: All right. I think I am set now.

Mr. Sawyer: This is No. 5.

With respect to the picture THE TEN COMMANDMENTS:

(a) You did not offer or allow the Viking Theatre the opportunity to bid or negotiate for the picture, and the Viking Theatre protested in a letter to you dated June 27, 1956.

Answer: Admitted.

(b) The picture was licensed to the William Goldman Theatres, Inc., for exhibition at the Randolph Theatre under license agreement executed June 25, 1956.

Admitted.

By Mr. Sawyer:

Q. Now, with respect to the Paramount picture BIRDS AND BEES, Mr. Wren—

A. Yes, sir.

Q. —did the Viking seek that picture?

A. Yes, sir.

• • •

(1089)

Q. I show you P-162, and I ask you what that is.

• • •

A. It is a form of the Paramount Film Distributing Company, request for offer, covering the BIRDS AND BEES, made available on or about 5/2—or 5/8 it might be —'56.

It contains the bid submitted by the Viking Theatre for the BIRDS AND BEES, a minimum of ten days, approximately on availability which you advise is on or about May 8, 1956.

We list the top admission price, $1.49, and the terms offered was 25 to 50 per cent sliding scale, the sliding scale attached.

Attached is also the sliding scale and the amount you propose to spend for advertising is attached.

Do you want me to read the sliding scale?

(1090)

By Mr. Sawyer:

Q. I don't think anybody wants the sliding scales read, but at this moment let me ask you what is a sliding scale.

A. Well, the best way it can be described, I believe, to the layman, is the fact that you are giving—which in this case is the distributor—the opportunity to earn more than the minimum scale, the minimum percentage offered.

For example, if it goes from 25 to 50 per cent, the minimum that he can receive on the sliding scale is 25 per cent, but as the picture—if it should do more, the picture, then he can earn up to 50 per cent.

(1091)

Q. Was the Viking bid on BIRDS AND BEES accepted or rejected?

A. Rejected.

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(1096)

Q. Now, Mr. Wren, with respect to the picture PROUD AND PROFANE, who distributed that picture?

A. Paramount Distributing Corporation.

Q. Did the Viking submit a bid?

A. Yes, sir.

• • •

(1097)

Q. I show you a copy of a document that has been marked P-163, and I ask you what that is.

A. Again, it is a copy of Paramount Film Distributing Corporation Request for Offer, covering the motion picture THE PROUD AND THE PROFANE, available on or about

July 25, 1956, covering an offer submitted by the Viking which is attached and reads as follows:

Rider for THE PROUD AND THE PROFANE bid due March 30, 1956.

TERMS OFFERED: $50,000 minimum guarantee versus: Distributor to receive 70 per cent of the gross

(1098)

receipts after deducting:

(a) $5170.19 operating expense.

(b) Actual cost of Paramount News and Shorts shown during any one week of the exhibition of THE PROUD AND THE PROFANE not to exceed $175 per week.

(c) The exhibitor's share (30%) of all advertising money spent for pre-opening, first and subsequent weeks.

(d) The cost of any additional help or overtime designed to produce additional revenue at the box office, regardless of whether such additional revenue is produced. Overtime not to exceed $200 per week.

Guarantee to cover the entire engagement.

PLAYING TIME: maximum of seven (7) weeks. Approximately on availability.

ADVERTISING: Entire teaser ad campaign, if any to bet paid by the distributor.

Pre-opening and first week—Distributor agrees to reimburse the exhibitor to the extent of 70% of the actual advertising costs. Advertising to mean all forms of advertising, publicity and exploitation including newspaper ads and the necessary engravings, radio and TV, painted bulletins, billboards, theater lobby displays, etc. used prior to and during the

(1099)

engagement of THE PROUD AND THE PROFANE.

Subsequent weeks—Distributor agrees to reimburse the exhibitor to the extent of 70% of the actual advertising costs. Advertising to mean all forms of advertising, publicity and exploitation including newspaper ads and the necessary engravings, radio and TV, weekly rental of painted bulletin boards and billboards,

Attached is a clearance schedule.

Q. Was that bid accepted or rejected?

A. No, it was rejected.

Q. Where did the picture play?

A. The picture played at the Stanton Theatre.

• • •

Q. Now, with respect to the picture THE HARDER THEY FALL, who was the distributor of that motios picture?

A. Columbia Pictures.

Q. And was the Viking anxious to obtain that picture for exhibition at the Viking Theatre?

A. Yes, sir.

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(1100)

Q. Who was in that?

A. Bogart.

Q. Did you make a bid for that picture?

A. No, because we were not permitted to screen the picture.

Mr. Ward: That is objected to, if Your Honor please, as a conclusion.

The Court: Sustained.

By Mr. Sawyer:

Q. Will you tell the circumstances under which you sought to screen the picture.

A. We had read that Mr. Abraham Montague, at that time I believe he was vice president in charge of sales for Columbia, had screened a print—what is known as a rough cut—of THE HARDER THE YFALL, at the studios. Subsequently, when the picture was offered we were told that they had two reels of scenes from the picture, which they had compiled and that we would be privileged and afforded the opportunity to see the two reels, and after the screening of which we were to submit an offer. But we could not see the motion picture.

Q. How many reels would a picture like this run, altogether?

A. Ten, twelve, maybe more.

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(1102)

AFTERNOON SESSION

Q. Mr. Wren, before we turn to WAR AND PEACE I would like to go back for a moment to THE PROUD AND THE PROFANE.

I show you once again the document which has been marked P-163, that being the Viking's contract, the Viking's bid, as to which you testified this morning. Was there an availability date specified by the distributor Paramount for that picture?

A. Yes, in the event—

Mr. Ward: In the document, you mean, Mr. Sawyer?

Mr. Sawyer: Yes, that is right, in the document.

The Witsess: Yes, the availability date contained in the request for offer covering the picture THE

PROUD AND THE PROFANE was on or about July 25, 1956.

Q. What did your bid specify with respect to the availability date?

A. Minimum of seven weeks approximately on availability.

(1103)

Q. Now, you testified as to where that picture actually played.

A. At the Stanley Warner Stanton Theatre.

Q. Did it play there on availability?

A. No, sir, it did not.

Q. When did it play?

A. It opened July 4th, 1956.

Q. Was that a holiday showing, the 4th?

A. Yes, sir.

Q. Were you ever informed at any time by Paramount of any availability other than that which appears on their request for bid?

A. No, sir.

Q. At the time of July 4th or during that holiday what picture were you playing at the Viking Theatre?

A. It would be the last two or three weeks of the MAN IN THE GRAY FLANNEL SUIT.

Q. And what were the grosses that you obtained for the last two or three weeks of THE MAN IN THE GRAY FLANNEL SUIT?

Mr. Ward: Objected to, if Your Honor please.

The Court: Well, we have I think covered that before, havent' we?

I will overrule the objection.

(1104)

By Mr. Sawyer:

Q. Do you have an actual recollection? If you do not I will show you.

A. It must have been—let me see, I would say $7,000, $5,000, $5,000, the last three weeks of the engagement.

Mr. Ward: Just a second. May I ask what you are looking at now, Mr. Wren? You are referring to a paper, aren't you?

Mr. Sawyer: I am sorry, Your Honor, a report of Viking's grosses and rental throughout the period.

Mr. Ward: He is refreshing his recollection.

Mr. Sawyer: On the 10th week.

The Witness: On the 10th week, MAN IN THE GRAY FLANNEL SUIT grossed $7,341, the 11th week $5,188, and the 12th week $5,596.

Q. What is your highest expense approximately, Mr. Wren?

A. $5,000.

Q. What is the date of the 11th week?

A. Well, the week just before the 4th of July.

Q. And what was the date then of the 12th week?

A. The week after the 4th.

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(1114)

Q. Now, Mr. Wren, with reference to the motion picture WAR AND PEACE, who was the distributor of that picture?

A. Paramount Film Distributing Corporation.

Q. How were you advised as to the fact that that picture was coming out?

A. By letter.

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(1116)

Mr. Sawyer: Now, I would like to read Paramount's answers to requests for admissions No. 5(a)

and (b). This is with respect to the picture WAR AND PEACE:

(a) On April 5, 1956, you solicited competitive

(1117)

bids to the Mastbaum, Stanley, Randolph, and Viking Theatres for first-run Philadelphia for an engagement to open September 13, 1956.

Answer: Admitted.

(b) You limited the request to bid to those theatres in part because the running time of the picture in your judgment precluded smaller theatres from profitably and advantageously exhibiting the picture.

Answer: Admitted.

I will now read (c), question and answer. .

(c) In selecting those four theatres you were seeking not only theatres which had the best location but also which would be of sufficient size to produce the revenue which you believe a picture of such magnitude should merit.

That is denied, except that the plaintiff admits that the factors considered in selecting the theatres as to which this defendant would negotiate for the licensing of the motion picture WAR AND PEACE was whether the theatre would be of sufficient size to produce the revenue which this defendant believed the magnitude of this picture would merit.

Mr. Ward: There is no objection to that, with the understanding heretofore stated that it is offered

(1118)

as to Paramount.

Mr. Sawyer: At this point, yes.

• • •

Mr. Sawyer: Ultimately, I will offer it against Paramount and the theatre to which it was finally licensed.

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(1121)

By Mr. Sawyer:

Q. After all that, Mr. Wren, did you get a chance to screen the picture?

A. No, sir.

Q. Now, did you ask to screen the picture?

A. Yes, sir.

Q. Who did you ask, Mr. Wren?

A. We asked when we would be permitted to screen the picture and we were advised that there were no prints available for screening.

Q. What did you do then?

(1122)

A. We then asked Paramount if it would be possible for the Viking Theatre to submit a conditional offer for WAR AND PEACE, with the understanding that if and when we were afforded an opportunity to view a completed print of WAR AND PEACE, we would be able to within a given time, withdraw our offer without prejudice, if we so desired.

Q. When, if you recall, were the original bids due?

A. It would be on the request for offer.

Q. Well, in response to said request to submit bids conditionally, did you get any communication from anyone at Paramount, and if so, who?

A. In response to our inquiry, we received a reply from the chief lawyer for Paramount in New York, advising us that they would not—

Mr.Ward: Doesn't the letter speak for itself? I object to it.

By Mr. Sawyer:

Q. Who is the chief counsel for Paramount?
A. Mr. Louis Phillips.

Mr. Sawyer: I would like to have this letter marked for identification as Plaintiff's Exhibit No. 165.

(Letter dated April 23, 1956, from Paramount Pictures Corporation to Mr. Jay Wren, marked for identification as Plaintiff's Exhibit No. 165.)

(1123)

By Mr. Sawyer:

Q. Is that the letter, Mr. Wren?
A. Yes, sir.
Q. That is addressed to whom, Mr. Wren?
A. To me.
Q. And signed by whom?
A. Mr. Louis Phillips.
Q. What is the date of that letter?
A. April 23, 1956.

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(1124)

Q. Will you read it, Mr. Wren.

A. "Paramount Pictures Corporation,,
"Times Square
"New York 36
"Louis Phillips, Vice-President and General Counsel, Bryant 9-8700, Cable Address Famfilm, April 23, 1956.

"Mr. Jay Wren,
Viking Theatre,
"Philadelphia, Pa.

"Dear Mr. Wren:

"Your telegram dated April 12, 1956, sent to

(1125)

our Mr. Ulrik Smith, has been referred to me for atten-

tion and reply. Your telegram relates to our picture WAR AND PEACE, for which we have requested offers for the special engagement in Philadelphia, beginning September 13, 1956.

"You state that until such time as you are afforded the opportunity to screen the picture, the management of the Viking Theatre is unable to submit a firm offer for a license to exhibit this picture.

"You request that you be permitted to submit an offer, with the understanding that after screening WAR AND PEACE, if the management of the Viking Theatre decided that the motion picture is not of the caliber anticipated, you may withdraw the offer without prejudice. I regret exceedingly that this request of yours cannot be granted.

"You are being treated on an equal footing with every other exhibitor whom we solicited to make an offer. No exhibitor has seen the picture, and no print is available in the United States. We expect that a print will be available some time in July. Our top executives who found it necessary to see the picture were obliged to fly to Rome to see it. They believe it will be one of the greatest pictures of all time.

(1126)

"If you desire to bid, you may do so unconditionally. Other exhibitors are asked to do the same. If you do not see fit to do so, that is your privilege. There is no competitive disadvantage to you in the way we are offering this picture, since all exhibitors are treated alike.

"Very truly yours,

"Louis Phillips."

Q. And in response to that, did you bid unconditionally?

A. First, we sent a wire to Mr. Phillips saying that we would be submitting an unconditional bid.

Mr. Sawyer: Now, I would like to have marked for identification documents which were Stanley Warner Exhibit 38-A and I ask to have them marked as Plaintiff's Exhibit No. 166.

(Copy of bid of Manager of Viking Theatre on WAR AND PEACE to Mr. Phillips, marked for identification as Plaintiff's Exhibit No. 166.)

By Mr. Sawyer:

Q. I ask you what those documents are.

A. This is a copy of the bid which the Manager of the Viking Theatre made on WAR AND PEACE which was sent to Mr. Phillips in New York.

Q. Will you read it, please, sir.

(1127)

Mr. Ward: What is the date?

By Mr. Sawyer:

Q. What is the date, Mr. Wren?

A. May 3, 1956.

"Mr. Louis Phillips, Vice-President and General Counsel, Paramount Pictures Corporation, Times Square, New York 36, New York.

"Dear Mr. Phillips:

"In reply to your letter of April 23, 1956 advising us that 'if you desire to bid you may do so unconditionally' for the exhibition rights to a special engagement of WAR AND PEACE in Philadelphia, we herewith submit the following offer for the Viking Theatre:

"Terms: $45,000 minimum guarantee vs.:

"Distributors to receive 90 per cent of the gross receipts after deducting (a) $5,333.54. . . ."

Q. Just hold that. Stop right there.

(1128)

All right, continue, please.

A. *Guarantee to cover the entire engagement including any additional playing time.

PLAYING TIME. Minimum of seven weeks. To start Thursday, September 13, 1956.

ADVERTISING: Pre-opening and First Week—Distributor agrees to reimburse the exhibitor to the extent of 90% of all actual advertising costs. Advertising to mean all forms of advertising, publicity and exploitation including newspaper ads and the necessary engravings, radio and TV, painted bulletins, billboards, theatre lobby displays, valance, etc., used prior to and during the engagement of WAR AND PEACE.

Advertising budget must include the following:

(a) the painting of centrally located bulletin boards $925.00

(b) weekly rental of 5 painted bulletin boards 48.13

(c) weekly rental of 14-28 sheet boards and 1-6 sheet board 1.25

Subsequent Weeks—Distributor agrees to reimburse the exhibitor to the extent of 90% of the actual advertising costs. Advertising to mean all forms of advertising, publicity and exploitation including

(1129)

newspaper ads and the necessary engravings, radio and TV, weekly rental of painted bulletins and billboards, etc.

Advertising budget must include the following:

(a) weekly rental of 5 painted bulletin boards $48.13

(b) weekly rental of 14-28 sheet boards and 76.19

1-6 sheet board 1.25

Attached hereto are:

1. The Viking Theatre's Expense Schedule
2. Completed Request for Offer form
3. Holdover Rider
4. Contract Agreement.

Many thanks for affording the management of the Viking Theatre the opportunity to submit this offer.

Kindest regards,

Sincerely,
Jay Wren

(1130)

Q. Was the offer accepted?
A. No, sir.

• • •

Mr. Sawyer: I would like to read now the request for admission, Paramount 5(h):

On May 3, 1956, the Viking submitted a written offer which you received on May 4, 1956, offering a

(1131)

minimum cash guarantee of $45,000 against a film rental of 90 per cent of the gross receipts after deducting $4,332.54 each week and minimum playing time of seven weeks starting September 13, 1956, and advertising to be divided into the same percentage ratio as film rental.

Admitted.

Paragraph 5(k) also with respect to the picture WAR AND PEACE:

On May 10, 1956, the picture was awarded to the Stanley Theatre in Philadelphia for a film rental of 90 per cent of the gross receipts over $7,483, plus overtime each week, and no cash guarantee, advertising to be divided in the same proportion as film rental.

A. Admitted.

This is now 4(l) with respect to the picture WAR AND PEACE.

(1) The picture played at the Stanley Theatre from September 19, 1956, to November 13, 1956, grossing $117,379.20, and you received a film rental of$47,-546.38.

By Mr. Sawyer:

Q. Now, Mr. Wren, with respect to the motion picture MAN IN THE GREY FLANNEL SUIT, I will ask you, first of all, who was the distributor of that motion picture?

(1132)

A. Twentieth Century-Fox Film Corporation.

Q. Did you have any discussions with anyone in Twentieth CenturyFox Film Corporation—strike that.

Did you have any discussions with anyone connected with the Fox Theatre about the picture MAN IN THE GREY FLANNEL SUIT?

A. Shortly before the bid due date—

Q. Did you or did you not?

A. Yes.

Q. And with whom?

A. Mr. William Moclair, Managing Director of the Fox Theatre located at 16th and Market Streets, Philadelphia, and Mr. Frank Ricketson, Jr., head of National Theatres, which operates the Fox Theatre, Philadelphia.

Q. What was the discussion, when did it take place, and where?

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(1133)

A. Shortly before the bid due date for the motion picture THE MAN IN THE GREY FLANNEL SUIT I received a call from Mr. William Moclair of the local Fox Theatre telling me that Mr. Frank Ricketson was in town.

Q. From where?

A. From headquarters, from National Theatre Headquarters, and that he would like to arrange to meet with me to discuss an important matter.

I arranged to meet with Mr. Moclair and Mr. Ricketsion, at which time I was asked by Mr. Ricketson why we were bidding for Fox pictures.

Q. Now, when you say Fox pictures—

(1134)

A. Twentieth Century-Fox pictures.

Q. All right.

A. We told him we were bidding for Twentieth Century-Fox pictures as well as all other companies' pictures because we, like other exhibitors, needed a film to keep the house open.

He said: Well, why don't you go to see someone with reference to getting some film?

I said: Well, whom would you suggest?

He said: Well, why don't you go to see Mr. Goldman and Mr. Stanley Warner?

I said: Well, you are here seeing me. I don't see why I should be directed to someone else. We are going to bid for Twentieth Century-Fox film for the very reason that you submit offers for films, and that is to keep our theatre open.

And he said: Well, we certainly would like you to get off our back.

And I said: Well, unfortunately, we need film for our theatre and we are going to have to submit offers for those pictures which we think we should have in the theatre.

Q. Was this discussion in relationship to a particular film, Mr. Wren?

(1135)

A. Yes, THE MAN IN THE GREY FLANNEL SUIT.

Q. And how long before the bids on THE MAN IN THE GREY FLANNEL SUIT approximately did this take place?

A. Oh, this was about four days before.

The day before THE MAN IN THE GREY FLANNEL SUIT bid was due Mr. Moclair came to the Viking Theatre alone to ask me not to bid on this picture, that they needed it at the Fox Theatre.

Q. Did you have a picture at the Viking Theatre at that time for the time of the availability of THE MAN IN THE GREY FLANNEL SUIT?

A. No, sir.

Q. What did you do after that with respect to THE MAN IN THE GREY FLANNEL SUIT?

A. I discussed the matter—the meeting and the matter of submitting a bid for THE MAN IN THE GREY FLANNEL SUIT with my superior, Mr. Harry Sley.

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(1136)

Q. As a result of that meeting with Mr. Sley what did you do with respect to THE MAN IN THE GRAY FLANNEL SUIT?

A. We submitted a bid for THE MAN IN THE GRAY FLANNEL SUIT.

Q. And what was the bid?

A. $106,500 guarantee, a minimum of ten weeks playing time, a 90/10 basis, distributor to pay the advertising.

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(1141)

Q. Now, did you get the picture?

A. Yes, sir.

Q. When did you submit the bid and where?

A. The exact date I do not know, but we submitted it to the Twentieth Century-Fox branch in Philadelphia at the time specified. I think it was around noontime.

Q. To whom did you submit it?

A. Mr. Sam Diamond, the branch manager.

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(1143)

Q. Did you have an opportunity to look at the bids of others?

• • •

The Witness: Yes.

By Mr. Sawyer:

Q. And did you see the bid submitted by the Fox Theatre?

A. Yes.

Q. What was that bid?

• • •

The Witness: Considerably lower than ours. I forget the exact amount. I think it was $60,000.

(1144)

By Mr. Sawyer:

Q. Guarantee?

A. Guarantee, that is right.

Q. Did you play the picture THE MAN IN THE GRAY FLANNEL SUIT?

A. Yes, sir.

Q. Was that the picture you referred to earlier as the last few weeks having run in July?

A. Yes.

• • •

(1145)

Q. Mr. Wren, with respect to the motion picture AMBASSADOR'S DAUGHTER, who was the distributor of that motion picture?

A. United Artists Corporation.

Q. Did Viking make any attempt to license that motion picture?

A. Not the first time it was offered. The second time it was offered we did.

Q. Did you submit a bid?

A. Yes, sir.

Q. Was that bid accepted?

A. No, sir.

Q. Was that bid submitted in writing or orally, do you recall, Mr. Wren?

A. I think it was orally.

* * *

(1146)

Q. I ask you what that document is which has been marked P-167, Mr. Wren.

A. It is a letter from Mr. Gene Tunick, the branch manager, to me, advising:

"This is to advise you that your latest offer on AMBASSADOR'S DAUGHTER as follows:

"50% first week. Indefinite Run

25-50% Balance. One week guarantee has been rejected by the producer and the picture has been awarded by the producer to your competitor, Randolph Theatre.

"We want to thank you very much for your interest in this subject.

"Kind regards."

* *

(1151)

Q. Now, with respect to the motion picture SOMEBODY UP THERE LIKES ME, who released that motion picture?

*

A. Loew's, Inc., Metro-Goldwyn-Mayer.

Q. Did anyone connected with Metro-Goldwyn-Mayer, Mr. Wren, talk to you about this picture?

A. Yes.

Q. Who was that?

A. Mr. Louis Formato, the Branch Manager, told me that they had no print for screening, and we advised Mr. Formato we knew Stanley Warner, a representative of Stanley Warner, screened the picture in New York, and we asked for the advertising plans with regard to the picture. He told us they had no advertising plans, but they would screen the picture that evening at 5:30 P.M., and that if we were interested in submitting an offer, it had to be in the next morning at 9:00 A.M.

Q. Now, did you submit an offer?

A. No, sir, it was—the notice was far too short.

Q. Did you communicate to anyone at Loew's as to why you were not submitting an offer?

(1152)

A. Yes, I believe we sent them a telegram and told them about the advertising.

Q. Now, with respect to the motion picture PILLARS IN THE SKY, I will ask you who released that motion picture, Mr. Wren?

A. Universal International.

Q. Were you invited to a screening of this motion picture?

A. I Was.

• • •

(1153)

Q. Mr. Wren, were you invited to a screening of that picture?

A. Yes, sir.

Q. Where was the screening?

A. Universal projection room, 13th and Vine Streets.

Q. Did you go?

A. Yes, sir.

Q. After having looked at the picture, did you decide you were interested in licensing it?

A. Yes, sir.

Q. What did you do?

A. I went upstairs on the second floor of the building to see Mr. Heiber, the Branch Manager.

Q. Proceed.

A. To ask him about PILLARS IN THE SKY, and Mr. Heiber told me that the picture had been sold.

(1154)

I said, "Why was I invited to a screening?"

He said, "That is just one of those things. The booker sends out the screening notice, and it is just unfortunate that you got one."

Q. Did he say to whom it had been sold?

A. No, sir, he did not.

Q. Now, do you know where the picture played finally, if you recall?

A. I think the Goldman Theatre.

Q. Now, with respect to the picture KING AND I, who released that picture?

A. Twentieth Century-Fox Film Corporation.

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(1156)

Q. Mr. Wren, what is P-169?

A. It is a carbon copy of the offer submitted by the Viking Theatre to Twentieth Century-Fox for the motion picture THE KING AND I.

Q. What terms does it offer for THE KING AND I?

A. Should I read the entire letter?

• • •

(1157)

A. Mr. Sam Diamond
20th Century Fox Films
(1158)
314 North 13th Street
Philadelphia, Pa.

Dear Sam:

In reply to your Request for Offer of June 22, 1956, inviting us to competitively negotiate for a license to exhibit first run Philadelphia the motion picture, THE KING AND I, we herewith submit the following offer for the Viking Theatre:

TERMS: $60,000, minimum guarantee vs:*

The distributor's share of the gross receipts during any week, computed separately and not cumulatively, shall be 90 per cent of the gross receipts after deducting:

(a) $4975, plus

(b) $175, plus

(c) $200.

*Guarantee to cover the entire engagement including any additional playing time. Guarantee to be paid in the same manner as MAN IN THE GRAY FLANNEL SUIT was paid.

PLAYING TIME: Minimum of six (6) weeks. To start on or about July 13, 1956.

Termination of the engagement to be mutually agreed upon.

ADVERTISING: *Pre-opening and First Week*—Distributor to pay all advertising. Advertising to mean all forms of advertising, publicity and exploitation including newspaper ads and the necessary engravings, radio and TV, painted bulletins, billboards,

theatre lobby displays, valance, etc., used prior to and during the engagement of THE KING AND I.

Advertising budget must include the following:

(a) the painting of 5 centrally located bulletin boards.	$925.00
(b) weekly rental of 5 painted bulletin boards.	48.13
(c) weekly rental of 14-28 sheet boards and 1-6 sheet board.	76.19 1.25
	$1050.57

Subsequent Weeks—Distributor to pay all advertising. Advertising to mean all forms of advertising, publicity and exploitation including newspaper ads and the necessary engravings, radio and TV, weekly rental of painted bulletins and billboards, etc.

Advertising budget must include the following:

(a) weekly rental of 5 painted bulletin boards	$48.13
(b) weekly rental of 14-28 sheets boards and 1-6 sheet board	76.19 1.25
	$125.57

* * *

(1160)

Q. Mr. Wren, with respect to the movie FIRST TRAVELING SALES LADY, who was the distributor of that motion picture?

A. RKO Radio Pictures.

Q. Did you receive an invitation to bid on that picture?

A. Yes, sir.

Q. Do you remember what the bid due date was?

A. No, sir, I do not, but we asked—

Q. All right. Did you make any request to screen that picture?

A. Yes, sir.

Q. Did you screen it?

A. Yes, sir.

Q. Then what did you do after screening it?

A. Advised RKO, through its branch manager, Mr. Charles Zagrans, we would like to negotiate for the picture.

Q. Did you ever get any reply to that?

A. No, sir.

Q. What was the next thing you knew with respect to FIRST TRAVELING SALES LADY?

A. We read that it was to play the Goldman Theatre.

Q. You read it where?

A. In the newspaper.

* * *

Mr. Sawyer:

* * *

(1162)

Now, this is offered, Your Honor, to show that here he goes and he asks about the picture and he never hears anything. They pay no attention and make no reply.

* * *

(1169)

Q. Now, with respect to the picture THE WILDER YEARS, by whom was that picture distributed, Mr. Wren?

A. Loew's, Incorporated, or Metro-Goldwyn-Mayer, as it is now known.

Q. And did the Viking make an offer for that picture?

A. Yes, sir.

Mr. Sawyer: This is P-116.

Q. I show you a document which has been previously marked P-116 and ask you what that is.

A. It is a copy of the offer submitted by the Viking Theatre for the motion picture THE WILDER YEARS. It is addressed to Mr. Lou Formato, Metro-Goldwyn—

Q. Did the Viking withdraw that offer, Mr. Wren?

A After waiting 15 days for a reply.

Q. What was the playing time of the Viking offer?

A. "Three weeks to start approximately on availability

(1170)

which you advise is August 8 or 9, 1956."

Q. Do you recall where that picture finally played?

A. The Mastbaum Theatre, Stanley Warner Mastbaum Theatre.

Q. How long did it play?

A. One week.

Q. Now, with respect, Mr. Wren, to the picture BAD SEED, who was the distributor of that picture?

A. Warner Brothers Pictures.

Q. Did the Viking Theatre seek to obtain that motion picture?

A. Yes, sir, we did.

• • •

(1174)

Mr. Sawyer: Now I read, Your Honor, Warner's answers to Requests for Admission No. 9:

"9. With respect to the picture THE BAD SEED:

(a) The Viking Theatre, on July 30, 1956, offered you a minimum cash guarantee of $17,500, 50% of the gross receipts during the first week 40 to 50% on a sliding scale during the second week, 35 to 50% on a sliding

scale during the third week, 25 to 50% on a sliding scale during the fourth week, to open

(1175)

approximately on availability.

(b) The Mastbaum offered no cash guarantee and offered you 70% of the box office receipts during each week, provided that the exhibitor's share should not be less than $10,848 each week, plus 10% of the box office receipts, plus 30% of the advertising expenditure, but provided further that during the first week you should receive a guaranteed minimum of 50%; during the second week, a guaranteed minimum of 40%; during the third week, a guaranteed minimum of 35%.

Answer 9. (a) and (b) It is admitted that after written offers, submitted on behalf of the Viking and Mastbaum Theatres, had been rejected, this defendant engaged in negotiations with the operators of these theatres and received, on or about July 30, 1956, new offers from them. It is admitted that the terms set forth in Request 9 (a) were all included in the offer submitted on behalf of the Viking Theatre, which offer, however, included additional terms requiring the distributor to bear 50% of the cost of specified advertising. It is denied that Request 9 (b) accurately sets forth the offer submitted on behalf of the Mastbaum Theatre. Said offer included guarantees of 50%, 40% and 35% respectively for the first three weeks of the engagement. It provided for additional film rental to

(1176)

the extent that the guarantee in any week was exceeded by 70% of the gross receipts remaining after deduction of $10,848 and exhibitor's share of advertising expenditures. It provided for distributor contributions to the advertising expenditures in accordance

with the percentage of film rental received by the distributor

(c) The picture was licensed to the Mastbaum Theatre under license agreement dated August 2, 1956. It played at the Mastbaum Theatre from August 29, 1956 to October 3, 1956, grossed $91,604.46 and you received a film rental of $33,655.43.

Answer (c) Admitted except that the motion picture was exhibited from August 30 to October 10 with a preview on August 29, and that the gross was $85,184.51."

By Mr. Sawyer:

Q. This is a document which has been previously marked P-45B.

A. Yes, this is the offer which you just referred to there.

Q. With respect to the motion picture BURNING HILLS, who was the distributor of that motion picture?

A. Warner Brothers.

Q. Did you indicate to Warner Brothers an interest in negotiating for the license of that motion picture?

A. We did.

• • •

(1179)

Q. By what means did you indicate it? By what means of communication?

A. Probably telegram.

Q. Did you ever have any reply?

A. No, sir.

Q. Now, with respect to the motion picture SOLID GOLD CADILLAC, who was the distributor of that motion picture?

A. Columbia Pictures Corporation.

Q. How many offers did you submit, if you submitted

A. Yes, sir.

Q. Did you submit an offer or offers? more than one?

A. I believe it was two.

(1180)

Q. Do you recall whether your first offer was in writing?

A. No, I think it was oral.

Q. Do you recall the terms that you offered, Mr. Wren?

A. No, I do not.

Q. Do you recall whether those terms included a cash guarantee?

A. They did not.

Q. Did you have any discussion with anyone at Columbia about licensing SOLID GOLD CADILLAC?

A. Yes, I met with Mr. Weiner.

Q. Who is Mr. Weiner?

A. Harry Weiner is the district manager of Columbia Pictures, and Mr. Lester Wurtele, the branch manager of Columbia Pictures.

Q. Where did you meet with them?

A. At their office.

Q. Where is that?

A. At that time it was in the Film Center Building on North 63th Street just off Vine.

Q. What was the date of that meeting, if you recall?

A. Sometime in August.

(1181)

Q. And what was this? What took place at the meeting?

A. Mr. Weiner told me that if we were interested in obtaining the motion picture THE SOLID GOLD CADILLAC we would have to submit as offer containing a substantial cash guarantee, and that if we did the cash guarantee would have to be paid in advance by certified check.

Q. What was your response to that?

A. I told Mr. Weiner that we would discuss the matter with Mr. Siey and get back to him.

Q. Then what happened?

A. Later in the afternoon, I would say 4:00 or 5:00 o'clock; I received a call from Mr. Weiner advising me that his New York Office had advised him that SOLID GOLD CADILLAC had been awarded to Mastbaum Theatre and therefore I was not to discuss the matter any further with Mr. Sley.

(1183)

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NINTH DAY

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(1185)

JAY WREN, recalled.

DIRECT EXAMINATION (Continued)

The Court: Proceed, Mr. Sawyer.

Mr. Sawyer: Thank you, sir.

By Mr. Sawyer:

Q. Mr. Wren, I believe at the close yesterday I was about to ask you about the motion picture BUS STOP. Who was in that picture and who distributed it?

A. Marilyn Monroe and it was distributed by Twentieth Century-Fox.

Q. In the case of this picture, Mr. Wren, did you have an opportunity to see any bids submitted by any other theatre?

A. The Fox Theatre bid.

Q. Did the Viking seek this picture?

A. Yes, sir.

Q. And did you offer a bid?

A. Yes, sir.

Q. Or bids?

A. Yes, sir.

Mr. Sawyer: P-140.

By Mr. Sawyer:

Q. I show you a document which has been previously marked P-140 and ask you what that document is.

A. It is a carbon copy of the bid submitted by the Viking

(1186)

Theatre.

Q. For what picture?

A. For the motion picture BUS STOP.

Q. Now I show you a document which has been previously marked P-141 and ask you, first, if you saw that document at the time or approximately the time that bids were submitted?

A. Yes, sir.

Q. Where did you see it?

A. At the Twentieth Century-Fox branch.

Q. What is P-41?

A. It is a photostatic copy of the BUS STOP offer made by the Fox Theatre Philadelphia.

Mr. Young: I have no objection to that at all, Your Honor.

Q. Now, the bid of the Viking, first of all, Mr. Wren, did the Viking bid offer a guarantee?

A. Yes, sir.

Q. How much?

A. 15,000 minimum guarantee.

Q. Did the Fox bid offer a guarantee?

A. No, sir.

Q. What were the percentage terms, if any, offered by the Viking Theatre?

(1187)

A. The Viking Theatre was to be 90 per cent of the gross receipts to the distributor after deducting $4,975, plus $175, plus $275.

Q. What were the percentage terms offered by the Fox Theatre?

A. 50 per cent the first three weeks, 35 per cent the fourth week, 25 per cent the fifth week, 20 per cent the sixth and subsequent weeks.

Q. Did the Viking Theatre have a clause with respect to the playing time?

A. Unlimited run. To open on or about availability date which you advise is approximately the end of August.

Q. And did the Fox bid have a clause with respect to playing time?

A. On any week where the total receipts fall to $12,000 or less, that week to be the last week of the run.

Q. Did the Viking Theatre have a clause with respect to advertising?

A. Yes, sir.

Q. What was that clause?

A. Distributor to pay all advertising. Advertising to be in all forms of advertising, publicity and exploitation including newspaper ads and the necessary engraving, radio and/or TV, painted bulletins and/or

(1188)

bulletin boards, theatre lobby displays, valance, etc., used prior to and during the engagement of BUS STOP.

Q. Did the Fox Theatre have any clause with respect to advertising?

A. Advertising: Exhibitor agrees to participate 50 per cent of all advertising expended for the entire engagement.

Q. Did you obtain BUS STOP as a result of that bid?

A. No, sir.

• • •

(1189)

Q. First of all, Mr. Wren, did you read all of the terms offered by the Fox Theatre with respect to the motion picture BUS STOP?

(1190)

A. Yes.

Q. Is there an additional paragraph to that?

A. Yes.

Q. Will you read that, too, please?

A. Sam, I want to call your attention to the fact that our gross for the first three weeks of THE KING AND I was $105,102.87, of which you received 50 per cent, plus a participation on my part of 50 per cent of all advertising monies spent. I also want to point out that upon the conclusion of the first five weeks, I have paid film rental within a few thousand dollars of the original guarantee, and from all indications, you will obtain revenue over and above my guarantee. I only make mention of this fact to emphasize the grossing power and capabilities of the Fox Theatre.

* * *

(1192)

Q. With respect to the picture TEA AND SYMPATHY, who produced that picture? Strike the word "produced" and substitute the word "distributed."

A. It was distributed by Loew's, Inc., which is now Metro-Goldwyn-Mayer.

* * *

(1193)

Q. Mr. Wren, what was the first bid of the Viking, P-122?

A. "$30,000. guarantee vs:"

"First two weeks—50% of the gross receipts

"Third week—40%-50% Sliding Scale

"Fourth week—35%-50% Sliding Scale

"Any additional days—25%-50% Sliding Scale

"*Guarantee to cover the entire engagement including any additional playing time.

"PLAYING TIME: Minimum of four (4) weeks to start approximately on availability which you advise is September 26, 27 or 28, 1956.

"ADVERTISING: Advertising to be mutually agreed upon.

"Advertising to mean 'newspaper ads, radio, TV, the works!'"

Q. What was the second bid of the Viking?

A. The second bid of the Viking was submitted on September 6, 1956.

"TERMS: $27,500, guarantee vs:*-

"First two weeks—50% of the gross receipts

"Third week—40%-50% Sliding Scale

"Fourth Week—35%-50% Sliding Scale

(1194)

"Any Additional Days—25%-50% Sliding Scale

"*Guarantee to cover the entire engagement including any additional playing time. Guarantee to be paid as follows:

"(a) one week after opening $10,000.

"(b) two weeks after opening $10,000.

"(c) three weeks after opening $7,500, provided that any advertising money due us from Loew's Inc. has been paid or we have been authorized to deduct same from this ($7,500.) payment.

"(d) Any additional film rental earned will be paid within seven (7) days after the conclusion of the engagement.

"PLAYING TIME: Minimum of four (4) weeks to start approximately on availability which you advise is September 26, 27 or 28, 1956."

Q. Who got that picture? Did the Viking get it, Mr. Wren?

A. No, sir, the Randolph Theatre.

Q. Where did it play?

A. The Randolph Theatre.

Q. Belonging to what chain?

A. The Goldman Theatre chain.

Mr. Sawyer: I now read Interrogatory No. 4

(1195)

and the answer thereto of William Goldman Theatres, Incorporated.

> 4. Identify every picture on which you agreed to pay a minimum cash guarantee, giving the distributor of the picture, the theatre involved, and the date of the license agreement.
>
> Answer: To the best present knowledge of this answering defendant the only picture on which it was agreed to pay a minimum cash guarantee was COUNTRY GIRL, distributed by Paramount and exhibited at the Midtown Theatre, pursuant to award dated January 21, 1955.

By Mr. Sawyer:

Q. Now, Mr. Wren, with respect to the motion picture TOWARD THE UNKNOWN, who was the distributor of that picture?

A. Warner Bros.

Q. Did the Viking bid on that picture?

A. Yes, sir.

* * *

(1197)

Q. WRITTEN ON THE WIND. As to WRITTEN ON THE WIND, who was the producer or distributor of that picture?

A. Universal International.

* * *

(1198)

Q. Do you recall—first of all, what is this document P-170?

A. It is a carbon copy of the WRITTEN ON THE WIND offer submitted by the Viking Theatre, which evidently was attached—

* * *

(1199)

Q. Now, sir, did you have any response from Universal with respect to this delivered—first of all, will you read the terms of that bid?

A. Yes, sir.

"PICTURE: 'WRITTEN ON THE WIND'

"TERMS: $20,000. guarantee vs:"

"First Week—50% of the gross

"Second Week—50% of the gross

"Third Week—40%-50% S.S.

"Fourth Week—25%-50% S.S.

"Any Add'l Days—20%-50% S.S.

"In the event the third week's gross equals or exceeds $9,500., picture will be held for a 5th week.

"Guarantee to cover the entire engagement including any additional playing time.

"Guarantee to be paid in the following manner:

"(a) $10,000. with delivery of print.

"(b) the balance of the guarantee and any additional film rental will be paid within 7 days after the conclusion of the engagement provided that UI's

(1200)

share of the advertising has been paid or the Viking Theatre is authorized to deduct same from the balance of the film rental due.

"PLAYING TIME: Minimum of four (4) weeks to start approximately on availability which you advise is December 29, 1956.

"ADVERTISING: Distributor to run and pay the entire cost of a minimum of two teaser ads.

"Exhibitor agrees to share 50% of the cost of the first 9 days advertising (exclusive of teaser advertising). Exhibitor's share of the cost of this advertising is not to exceed $2250.

"Each subsequent week — Exhibitor agrees to share 50% of the cost of advertising. However, exhibitor's share is not to exceed $500. per week.

"It is agreed and understood that UI's Advertising Dept. is to supply the Viking Theatre with the first 4 weeks advertising schedule a minimum of 2 weeks prior to opening.

"THEATRE: Viking Theatre, Chestnut at 19th Street Negotiated Tuesday, September 18, 1956."

Q. Now, did you have any response from anyone at Universal as a result of that bid?

(1201)

A. We received a letter from Mr. Peter Dana in New York telling us that this bid, while not satisfactory—not completely unsatisfactory—

Mr. Ward: Just a minute. I don't like, sir, to interrupt, but I think if there is to be a reference to documents it would be helpful if they were referred to by the witness.

Mr. Sawyer: I ask to have this document marked. I don't think we need the envelope, but I ask to have this letter marked as P-171.

(Copy of a letter dated September 19, 1956, from Universal Film Exchanges Inc. to Mr. Jay Wren was marked for identification as P-171.)

By Mr. Sawyer:

Q. Is this the letter you just referred to, Mr. Wren, the document which has been marked P-171?

A. Yes, sir.

Q. Will you read that, please?

A. "UNIVERSAL FILM EXCHANGES, INC.
445 Park Avenue
New York 22, N. Y.

September 19, 1956

"Office of I. T. Dana
"Mr. Jay Wren
Viking Theatre
19th and Chestnut St.
Philadelphia, Pa.
(1202)

"Dear Mr. Wren:

"Mr. Heiber has forwarded your offer to me on WRITTEN ON THE WIND for first run showing in the Viking Theatre, Philadelphia. This offer while not satisfactory as it stands may form the basis of negotiations and I, therefore, suggest that you arrange with Mr. Heiber for a date with me here in New York at which time we can sit down and go over the whole thing and see if we can make a deal.

"I want to tell you, however, that at any such meeting I will have my attorney present and that everything that will be said will be taken down on a tape recorder or official court reporter as I do not want to take any chance of your misquoting me or my misquoting you. You are welcome to bring your own attorney and your own recording device or reporter, if you wish.

"Since I am anxious to market this picture as soon as possible, the meeting between us will have to take place within the next two weeks, otherwise I will take steps to license the picture elsewhere."

Q. Did you go, Mr. Wren?

A. Yes, sir.

Q. Did anybody go with you?

(1202a)

A. I believe Mr. London was with me.

Q. Who is Mr. London?

A. Mr. London was Mr. Sley's office manager.

(1203)

Q. And what happened when you arrived in Mr. Dana's office?

A. Mr. Dana presented me with a slip of paper outlining the only deal that would be acceptable to Universal.

Q. Who was present in Mr. Dana's office?

A. Mr. Dana's attorney and the recording equipment that he referred to.

Q. And did you take back with you this piece of paper that Mr. Dana gave you?

A. Yes, sir.

* * *

(1210)

Q. It is obvious, Mr. Wren, but to have it on the record, did the Viking get that picture?

A. No, sir.

Q. Now, Mr. Wren, with respect to the motion picture GIANT. Who released the motion picture GIANT?

A. Warner Brothers.

Q. And who was in that picture?

A. Rock Hudson, Elizabeth Taylor, James Dean, Carol Baker.

Q. What was the story based on?

A. Edna Ferber's novel.

Q. Did the Viking seek to license the picture GIANT?

A. Yes, sir.

Mr. Sawyer: This is Exhibit P-50.

By Mr. Sawyer:

Q. I show you a document which has been previously marked P-50 and ask you what that is.

A. It is a copy of the competitive bid application submitted by the Viking Theatre to which was attached the Viking Theatre offer.

* * *

(1219)

Q. Now, Mr. Wren, who distributed the motion picture JULIE?

A. Loew's Incorporated.

Q. Did you seek to license that picture?

A. We did.

Q. I show you a document which has been marked P-128 and

(1220)

ask you what that document is.

A. It is a carbon copy of the bid submitted by the Viking Theatre for the motion picture JULIE.

Q. What is that bid?

A. TERMS: First Three Weeks—50% gross
Any Additional Days—25%-50% Sliding Scale
If the gross receipts for the first four (4) days of the third week equal or exceed $6800., picture will be held for a fourth week. Same holdover figure applies to the first four (4) days of each subsequent week.
PLAYING TIME: Minimum of three (3) weeks to start approximately on availability.
CLEARANCE: See attached schedule.

Q. Did you get any response to that, Mr. Wren?

A. Yes, sir, the offer was rejected.

Q. Did you make another bid on that, Mr. Wren?

A. Yes, sir.

Mr. Sawyer: Just one moment, if you will, Your Honor.

P-133.

Mr. Ward: What is the date on that, sir?

Mr. Sawyer: October 26, 1956.

(1221)

By Mr. Sawyer:

Q. I show you a document which has been previously marked P-133 and ask you what that is.

A. It is a wire of October 26, 1956:

William Madden
Loew's Inc.,
250 North 13th St.,
Philadelphia, Pa.
Re: Telephone conversation and your letter of October 25th concerning negotiations JULIE, Viking Theatre offers same as submitted October 19, 1956.

Q. All right. Thank you.

(1227)

* * *

Mr. Ward: That is an entirely different matter, sir.

When you are talking about total gross receipts of the theater, for example, or when you are talking about national film rentals achieved by a picture, perhaps then there are some standards, but to attempt to measure the quality of any motion picture by a run at the Viking is simply

(1228)

just a drop out of the entire bucket; and it is not even a sampling, it is a totally inaccurate standard to apply. In order to reach what my friend says is his goal, namely, what is the quality of the picture, you cannot do it this way.

Mr. Sawyer: Your Honor, I would agree with Mr. Ward that the actual standard of the quality of a picture is its national gross, and I will offer

both the Viking gross and the national gross in terms of that exact same standard, because when anybody says that a motion picture is inferior to another, it is true that to simply take its performance in a given theater does not in and of itself prove that point. It may have relevancy to prove it, but it doesn't in and of itself. Whereas, if you take its performance throughout the United States then, of course, everybody agrees, that is the test, because there may have been theaters in which it did better than average or better than expected and other theaters in which it didn't do as well, depending on a number of factors. Of course, I would put in both. I want to assure Your Honor that both of those factors would go in, but not quite for the same purpose.

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(1307)

By Mr. Sawyer:

Q. Now, I ask you, Mr. Wren, what was the national gross earned by EAST OF EDEN nationwide?

• • •

The Court: Yes. All right.
Let's use the term "film rental."

Mr. Sawyer: Yes, sir.

The Court: EAST OF EDEN.

The Witness: EAST OF EDEN, $3,230,000.

The Court: So the jury will understand, for EAST OF EDEN, whether it is for a period of 12 months or 18 months, is that right?

(1308)

Mr. Goffman: That is the total national gross.

The Court: The total national rental.

Mr. Goffman: Film rental.

The Court: That Warner Brothers got for this picture.

• • •

By The Court:

(1309)

Q. So you did not get EAST OF EDEN. What picture did you play?

A. HIT THE DECK.

By Mr. Sawyer:

Q. What was the national film rental of HIT THE DECK?

A. $2,016,000.

Q. What picture did you play next, Mr. Wren?

A. THE GLASS SLIPPER.

Q. And what was the national film rental of the picture GLASS SLIPPER?

A. $1,381,000.

• • •

(1314)

Q. Mr. Wren, what was the national film rental of the motion picture STRATEGIC AIR COMMAND?

A. $5,563,000.

Q. Now, at the time that STRATEGIC AIR COMMAND was available for exhibition in motion pictures in first-run Philadelphia, what motion picture did you show at the Viking?

A. THE PRODIGAL.

Q. And what was the national film rental of the motion

(1315)

picture THE PRODIGAL?

A. $2,181,000.

(1318)

Q. What was the national film rental of the motion picture FOX FIRE?

A. $1,618,000.

Q. You also testified that you sought to license the picture HELL'S ISLAND and that you did not license the picture HELL'S ISLAND?

A. Yes, sir.

Q. What was the national film rental of that motion picture?

A. $687,000.

Q. During the time that either of those pictures were available for exhibition in motion picture theaters first run Philadelphia what picture was the Viking playing?

A. WIZARD OF OZ.

Q. What kind of a picture was WIZARD OF OZ?

A. A reissue.

• • •

(1322)

Q. Now, Mr. Wren, we are in great suspense. Will you now tell us what the national film rental was.

• • •

The Witness: WIZARD OF OZ, re-release, $448,000.

By Mr. Sawyer:

Q. Thank you.

What picture did you play next, Mr. Wren?

A. United Artists release NOT AS A STRANGER.

(1323)

Q. Was that a quality motion picture?

A. Yes, sir.

Q. How much film rental did you return to the distributor for the exhibition of that picture?

A. $95,524.

Q. During the run of NOT AS A STRANGER did you seek any film for playing after NOT AS A STRANGER?

A. Yes, sir.

Q. What was the first picture you sought?

A. SUMMERTIME.

Q. What was the national film rental of the picture SUMMERTIME? Did you obtain SUMMERTIME?

A. No, sir.

Q. What was the national film rental of the picture SUMMERTIME?

* * *

(1324)

Q. What was the national film rental of NOT AS A STRANGER, Mr. Wren?

A. $6,121,000.

Q. Now, I asked you I believe a question which is pending: What was the national film rental for the picture SUMMERTIME?

A. $1,412,000.

Q. And when you did not obtain the motion picture SUMMERTIME

(1325)

did you seek to license another motion picture?

A. THE McCONNELL STORY, Warner Brothers.

Q. What, sir?

A. THE McCONNELL STORY, a Warner Brothers release.

Q. Did you obtain THE McCONNELL STORY?

A. No, sir.

Q. What was the national film rental of the motion picture THE McCONNELL STORY?

A. $2,223,000.

Q. Thereafter did you seek to license another picture to play at the close of NOT AS A STRANGER? If so, what one?

A. PETE KELLY'S BLUES.

Q. What was the national film rental of PETE KELLY'S BLUES?

A. $2,787,000.

Q. When you did not obtain PETE KELLY'S BLUES did you seek to license another motion picture for playing after the close of NOT AS A STRANGER?

A. SEVEN CITIES OF GOLD, Twentieth Century Fox.

Q. What was the national film rental of SEVEN CITIES OF GOLD?

A. $888,000.

Q. Did you obtain that picture?

A. No, sir.

Q. And thereafter did you attempt to license another motion picture to play at the close of NOT AS A STRANGER?

(1326)

A. TENNESSEE'S PARTNER.

Q. What was the national film rental of TENNESSEE'S PARTNER?

A. It was RKO. $731,000.

Q. During the time, the approximate time that these various motion pictures were available for exhibition at first run Philadelphia what motion picture did the Viking play?

A. DESERT SANDS.

Q. What was the national film rental of DESERT SANDS?

A. $481,000.

• • •

Q. You said, Mr. Wren, that you sought the picture THE LEFT HAND OF GOD and that you did not license it. What was the national film rental of LEFT HAND OF GOD?

A. That was Twentieth Century-Fox, $2,414,000.

Q. You have testified that you sought the picture TALL MEN and that you did not obtain it. What was the national film rental of the picture TALL MEN?

(1327)

A. $3,000,617—$3,617,000. I am sorry.

Q. $3,617,000?

A. $3,617,000.

Q. You testified that you sought the picture BLOOD ALLEY and did not obtain it. What was the film rental of that motion picture?

A. Warner Brothers. $1,830,000.

Q. Now, during the time in which those pictures were available first run showing in Philadelphia what picture or pictures was the Viking playing?

A. LUCKY GALLANT.

Q. What was the national film rental of LUCKY GALLANT?

A. $1,036,000.

Q. How long did you play LUCY GALLANT, Mr. Wren?

A. Three weeks.

• • •

Q. You testified that you sought to license the picture DESPERATE HOURS.

A. Right, sir.

(1328)

Q. And that you did not license that motion picture. What was the national film rental of that motion picture?

A. $1,510,000.

Q. During the time that the motion picture DESPERATE HOURS was available for showing first run Philadelphia what motion picture was the Viking showing?

A. THE GIRL IN THE RED VELVET SWING.

Q. What was the national film rental of that picture?

A. $1,177,000.

Q. Now, you have testified that you sought to license the motion picture GUYS AND DOLLS, and that you did not license it. What was the national film rental of that motion picture?

A. $6,850,000.

Q. During the time that GUYS AND DOLLS was available for exhibition first run Philadelphia what picture or pictures did the Viking show?

A. THE BIG KNIFE, United Artists.

Q. Any others, Mr. Wren, or are you finished?

A. And the four Universal pictures: SECOND GREATEST SEX, ALL THAT HEAVEN ALLOWS, THERE'S ALWAYS TOMORROW, and NEVER SAY GOOD-BY.

Q. What was the national film rental of THE BIG KNIFE?

A. $662,000.

Q. And then the national film rental of SECOND GREATEST SEX.

(1329)

A. $1,048,000.

Q What was the national film rental of ALL THAT HEAVEN ALLOWS?

A. $2,605,000.

Q. What was the national film rental of THERE'S ALWAYS TOMORROW?

A. $660,000.

Q. What was the national film rental of NEVER SAY GOOD-BY?

A. $1,319,000.

• • •

(1343)

Q. Now, Mr. Wren, you testified that you sought to license the motion picture SERENADE. What was the national film rental earned by that motion picture?

A. $1,053,000.

Q. You testified that you sought to license the motion picture THE HARDER THEY FALL.

Mr. Nizer: What was the distributor?

By Mr. Sawyer:

(1344)

Q. Mr. Wren, can you mention the distributor? You have it there and you can find it quicker than I can.

A. SERENADE was Warner Brothers and HARDER THEY FALL is Columbia.

Q. What was the national film rental of HARDER THEY FALL?

A. $1,195,000.

Q. During the period at which those pictures were available for exhibition in first-run Philadelphia what picture or pictures was the Viking exhibiting?

A. ON THE THRESHOLD OF SPACE, Twentieth Century-Fox.

Q. Go ahead. What was the national film rental of that?

A. $928,000.

Q. What other picture, if any?

A. COMANCHE, United Artists.

Mr. Young: Isn't that 997 for ON THE THRESHOLD?

The Witness: COMANCHE, $1,032,000.

By Mr. Sawyer:

Q. There is a question, Mr. Wren, as to the figure you gave for ON THE THRESHOLD. Would you recheck that, please?

A. THRESHOLD Of SPACE, $928,000, Twentieth Century-Fox.

* * *

(1345)

Q. Now, Mr. Wren, you testified with respect to the motion picture AWAY ALL BOATS, which was Universal. What was the national film rental—which you did not license—what was the national film rental of the picture AWAY ALL BOATS?

Maybe this is easier (indicating).

A. I think it is. These columns are not marked. It is Universal, AWAY ALL BOATS, $2,919,000.

Q. You also testified with respect to the motion picture THAT CERTAIN FEELING, which you did not license. Was that available at the same time as AWAY ALL BOATS?

A. Yes, sir.

Q. What was the national film rental on that picture?

A. $1,747,000.

Q. Now, at the time that either of those pictures were available for first-run Philadelphia, what motion picture or pictures was the Viking playing?

A. I misunderstood your question.

Q. At the time of either of those pictures you just mentioned, AWAY ALL BOATS and THAT CERTAIN FEELING, were available for exhibition in

first-run Philadelphia, what picture or pictures was the Viking playing?

(1346)

A. A KISS BEFORE DYING.
Q. What else?
A. A REBEL IN TOWN.
Q. Any others?
A. MOON IS BLUE and HIGH NOON.

• • •

(1349)

By The Court:

Q. GREY FLANNEL SUIT, when did you play that?

A. We played it from April 18 to July 11, 1956.

Q. What picture did you play after that?

A. A KISS BEFORE DYING and A REBEL IN TOWN.

Q. Those are the three?

A. And a combination of two reissues, MOON IS BLUE—

Q. You played MAN IN THE GREY FLANNEL SUIT from April 18 to July 11, so you didn't need any pictures—

A. Yes, we needed pictures because we had a ten-week commitment on GREY FLANNEL SUIT, and because of a lack of film

(1350)

we extended it two weeks, one of which, the 11th week, was $5,188, and the 12th week was $5,598.

Q. All right. So you tried to get what picture?

A. THAT CERTAIN FEELING and — shall I give you the gross of MAN IN THE GREY FLANNEL SUIT?

Q. Suppose you give it.

A. $3,601,000, and the picture AWAY ALL BOATS, that Universal had promised us.

• • •

Q. Now, what was the national gross of KISS BEFORE DYING?

A. United Artists picture—

Mr. Rome: I object to the phrase "gross."

Mr. Sawyer: I am sorry, the national film rental.

A. KISS BEFORE DYING, $574,000.

By Mr. Sawyer:

Q. What is the national film rental of A REBEL IN TOWN?

A. United Artists picture, $435,000.

(1351)

Q. Now, how did you play MOON IS BLUE and HIGH NOON?

A. As a combination of reissues.

Q. Were they both reissues?

A. Yes, both United Artists reissues.

• • •

(1353)

Q. There are no amounts listed there?

A. No, sir.

Q. You testified, Mr. Wren, that you played another picture—I am sorry—you testified, Mr. Wren, that you sought the picture SOMEBODY UP THERE LIKES ME and that you did not obtain a license for that picture. What was the national film rental on that motion picture?

A. It was a Loew's release.

Q. Loew's?

A. $1,941,000.

Q. During the time that that motion picture was available for exhibition in first-run Philadelphia, what motion picture or pictures did the Viking show?

A. RUN FOR THE SUN and BANDIDO. RUN FOR THE SUN, a United Artists release, $1,002,000, and BANDIDO, $1,193,000.

(1354)

Q. What picture, Mr. Wren, did you show after BANDIDO?

A. BIGGER THAN LIFE.

Q. What was the national gross on that motion picture?

A. $491,000, a Twentieth Century-Fox release.

Q. What did you show after that?

A. QUEEN OF BABYLON and ABDULLAH'S HAREM, Twentieth Century-Fox.

Q. How did you show those pictures?

A. As a combination.

Q. How did you show them? As a combination?

A. ABDULLAH'S HAREM grossed—

Q. What was the national gross?

A. $189,000.

Q. Yes. And QUEEN OF BABYLON?

A. $208,000.

Q. You testified as to the picture BUS STOP for which you did not obtain a license. What was the national film rental of the picture BUS STOP?

A. A Twentieth Century-Fox release, $3,288,000.

Q. You testified, Mr. Wren, as to the motion picture TEA AND SYMPATHY and that you did not obtain a license for that motion picture. What was the national film rental of that motion picture?

A. A Loew's release, $2,139,000.

(1355)

Q. During the time in which either of those pictures were available for showing in first-run Phila-

delphia what picture or pictures was the Viking showing?

A. ATTACK and THE LAST WAGON. ATTACK, a United Artists release.

Q. What was the national film rental?

A. $1,478,000 for ATTACK.

Q. And THE LAST WAGON?

A. LAST WAGON, Twentieth Century-Fox, $1,356,000.

Q. You testified, Mr. Wren, that you sought but did not obtain a license to exhibit the motion picture BAD SEED. Who released that picture?

A. Warner Bros.

Q. What was the national film rental?

A. $2,822,000.

Q. During the approximate period of time that BAD SEED was available for exhibition in first-run Philadelphia, what motion picture or pictures was the Viking showing?

A. THE POWER AND THE PRIZE, TEEN-AGE REBEL.

Q. THE POWER AND THE PRIZE was released by whom?

A. Loew's, Incorporated.

Q. What was the national film rental?

A. $568,000 for THE POWER AND THE PRIZE.

Q. TEEN-AGE REBEL?

(1356)

A. TEEN-AGE REBEL, Twentieth Century-Fox, $1,324,000.

Q. Mr. Wren, how many seats does the Viking Theatre have?

A. 1017.

Q. How many of those 1017 seats are in the balcony?

A. 57.

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(1360)

Q. Mr. Wren, is there a disadvantage possessed by balcony seats as compared to those on the ground floor in a motion picture theatre?

A. I'd say so, yes, definitely.

Q. And are there occasions in which less money is charged for balcony seats than is charged for ground floor seats?

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(1361)

Q. Answer yes or no.

A. Yes.

Q. As to the Viking Theatre, what kind of a screen does the Viking Theatre have?

A. Miracle Mirror screen.

Q. And what is i size?

A. 22 by 56.

Q. What is the distance between the rows in the Viking Theatre, back to back? This is between the backs of the seats?

A. 40 inches.

• • •

(1362)

Q. What kind of projection equipment does the Viking have, Mr. Wren?

A. The very best, Simplex projectors and Western Electric stereophonic sound with surround speakers.

Q. Is the view of the screen in the Viking Theatre good from all seats therein?

A. Excellent.

Q. Mr. Wren, you have told us something about the method of bidding in which you bid a certain percentage over house allowance, or house expense, or,

in the vernacular, house nut. What does the figure house expense or house allowance represent and how is it arrived at?

A. Well, one of two ways. Either the film company tells you what they will allow you for house allowance or it is a

(1363)

figure, an arbitrary figure that you insert into a bid when you submit an offer, either with the cash guarantee or without.

Q. And does it bear a relationship to the actual weekly expenses of running and operating the theatre?

A. It is an approximation.

Q. Now, as to the Viking Theatre, what, approximately, are the actual expenses of running the theatre each week, between what figures?

A. From $4500 to $5000.

Q. And in the various bids submitted by the Viking Theatre, is the portion of the bid known as "house allowance" or "house expense" always exactly the same figure?

A. Oh, no.

Q. Does it vary within a range and, if so, what range?

A. From $4900 to $5500.

* * *

(1366)

TENTH DAY

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(1368)

PLAINTIFF'S EVIDENCE (Continued)

JAY WREN, recalled.

DIRECT EXAMINATION (Continued)

• • •

Mr. Sawyer: Now, there is exhibited to the Court and jury a chart which lists and portrays in diagrammatic form the seating capacities of the Viking Theatre and that of the theatres of the defendant exhibitors.

• • •

Mr. Sawyer: It shows the following, that the Stanley Company's Mastbaum Theatre had a capacity of

(1369)

4,387 seats; that the Stanley Company's Stanley had a seating capacity of 2,932 seats; that the Fox Philadelphia Building's Theatre had a seating capacity of 2,422 seats; that the Goldman Theatre's Randolph had a seating capacity of 2,020 seats; that the Stanley Company's Stanley Theatre had a seating capacity of 1,017 seats, and that the Goldman Theatre's Goldman Theatre had a seating capacity of 1,188 seats; that the Viking Corporation's Viking Theatre had a seating capacity of 1,017 seats; and that the Goldman Theatre Company's Midtown Theatre had a seating capacity of 994 seats.

Mr. Ward: Do you want to refer to the other one, Mr. Sawyer?

Mr. Sawyer: Maybe we should save time.

There is a second chart which shows in diagrammatic form the seating capacities of all of the theatres in Philadelphia. It is not stipulated that all of the theatres on this chart are first-run theatres; however, the seating capacities on this chart, not already in the record, are the Arcadia Theatre 650 seats, the Trans-Lux Theatre 493 seats, the Studio Theatre 400 seats. We do not stipulate that that is the exact number, should it come up later, but I do not think it makes any difference.

And the World Theatre 499 seats.

The portion of the chart stating that these

(1370)

are first-run theatres is not agreed to with respect to the Studio and the World.

I think that covers, Your Honor, the respective sizes of the various theatres.

By Mr. Sawyer:

Q. Now, Mr. Wren, one point that we neglected to cover on Thursday, when we were speaking about the circumstances surrounding the licensing of certain films was the circumstances surrounding the licensing of the motion picture DESERT SANDS. Will you tell us how you obtained that picture and under what circumstances?

A. I went to the United Artists Exchange to negotiate a deal for DESERT SANDS and was told by Mr. Tunick that he would have to contact Stanley Warner, which he did, and Mr. Ted Minsky, film buyer for Stanley Warner, told him that the Stanton Theatre was interested in the picture and that they were

sending over a bid for the picture. As a result we had to submit a written bid rather than negotiate.

Q. At the time that you went to negotiate at what terms did you plan to negotiate the picture DESERT SANDS?

A. On a sliding scale, 25 to 50 per cent.

Q. 25 to 50?

A. Yes.

(1370a)

Q. And what bid did you submit ultimately?

A. The first week 40 to 50 per cent sliding scale and the second week 30 to 40 sliding scale.

(1371)

Q. I think you are in error on the second week according to your recollection. I show you the bid application.

A. It is 30 to 50 the second week instead of 30 to 40.

Q. Did you license the picture on those terms?

A. Yes, sir.

• • •

Q. Now, Mr. Wren, what is the importance of the playing

(1372)

time commitment to an exhibitor?

A. You mean as contained in a bid?

Q. Yes, or a license contract.

A. Well, on a contract if an exhibitor is committed for playing time, he is naturally involved with the expenses of the operation of the theatre, in addition to the film rental. The longer it plays, the theatre—I mean the picture, the more expense he has, theatrewise as well as filmwise, but the biggest problem on the playing time is that as the picture decreases in

gross it comes more obvious it will be more difficult to make the expenses.

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(1374)

By The Court:

Q. Let me ask you a question, Mr. Wren.

A. Yes, sir.

Q. You are being asked a question, as I recall, on a picture that plays for, say, seven weeks. Is that generally reasonably ascertainable, or can you generally say what the difference in gross the second week would be after the first week? Let me ask you this: Wouldn't that depend on the picture first?

A. In some instances, but by and large there is a pretty good formula.

• • •

Q. Wouldn't it depend on the time of year?

A. Yes.

(1375)

Q. Wouldn't it depend on the weather conditions?

A. To a degree.

Q. Obviously it would this year with a lot of snow.

A. Yes, sir, that's right.

(1377)

Q. I invite your attention, Mr. Wren, to the Viking

(1378)

grosses on NOT AS A STRANGER. How did that rank among the motion pictures that the Viking exhibited?

A. That the Viking exhibited?

Q. Yes.

A. It was the best of the motion pictures that the Viking exhibited.

Q. What was the first week's gross?

A. $34,048.

Q. What was the second week's gross?

A. $25,130.

Q. What was the third week?

A. $18,734.

Q. What was the commitment which the Viking had with respect to that? What was the playing time that the Viking committed itself to in the contract with United Artists for that picture?

A. A minimum of ten weeks.

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(1395)

Mr. Sawyer:

Q. Did the Viking have any picture to show in lieu of NOT AS A STRANGER during that eleventh and twelfth week?

The Witness: No, sir.

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(1396)

Q. All of the following pictures, Mr. Wren, as to which I will ask you, you testified played at the Viking Theatre, and you also testified that all of them attained a national film rental of less than a million and a half dollars.

Now I am going to ask you, Mr. Wren, how long the following pictures, all of which are in that category, played at the Viking Theatre:

ABDULLAH'S HAREM.

A. One week.

Q. REBEL IN TOWN?

A. One week.

Q. DESERT SANDS?

A. Two weeks.

Q. BIGGER THAN LIFE?
A. Six and a half days.
Q. THE POWER AND THE PRIZE?
A. Two weeks.
Q. KISS BEFORE DYING?
A. Two weeks and two days.
Q. THERE'S ALWAYS TOMORROW?
A. Two weeks and three days.
Q. THE BIG KNIFE?
A. Four weeks and two days.

(1397)

Q. THE THRESHOLD OF SPACE?
A. Two weeks.
Q. RUN FOR THE SUN?
A. One week and six days.
Q. COMANCHE?
A. One week and five days.
Q. LUCY GALLANT?
A. Three weeks.
Q. THE SECOND GREATEST SEX?
A. Three weeks.
Q. THE GIRL ON THE RED VELVET SWING?
A. Three weeks and six days.
Q. BANDIDO?
A. Two weeks.
Q. ATHENA?
A. Four weeks.
Q. NEVER SAY GOODBYE?
A. Three weeks.
Q. TEEN-AGE REBEL?
A. One week.
Q. GLASS SLIPPER?
A. Four weeks.
Q. ATTACK?
A. Three weeks.

(1398)

Q. LAST WAGON?
A. One week.

Mr. Sawyer: Now, Your Honor, I would like to offer or have marked as P-176 the film rental paid per week and any guarantees, if any, paid by the Viking Theatre on all the motion pictures they exhibited during the period of suit.

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(1403)

By Mr. Sawyer:

Q. Now, Mr. Wren, will you proceed with respect to the picture STUDENT PRINCE.

A. The first week the weekly film rental earned was $12,198; the second week $6400; the third week $3898; the fourth week $3582; the fifth week $3049; the sixth week $2955; the seventh week $2309; the eighth week $1877; four days of the ninth week $667.

(1404)

Q. How much did you actually pay in total to the distributor of the film?

A. $40,000 guarantee.

Q. Now, with respect to the motion picture BETRAYED, who was the distributor?

A. Metro-Goldwyn-Mayer, Loew's Incorporated as it was then called.

Q. What was the film rental paid to the distributor for the first week?

A. The weekly film rental earned the first week was $13,686.

Q. Continue.

A. The second week, $5,248;
The third week, $5,897;
The fourth week, $3,860.

The fifth week, $1,907.

Q. A total of how much was paid to Loew's for the rental of that film?

A. $30,598.

Q. Now, with respect to the picture BRIGADOON, who was the distributor?

A. Loew's, Incorporated.

Q. What was the amount of film rental paid the distributor for each week? Proceed right down the list.

(1405)

A. The first week, $10,483.
The second week, $5,717;
The third week, $4,622;
Fourth week, $2,928;
Fifth week, $2,207;
Sixth week, $2,481,
for a total earned film rental paid of $28,438.

Q. With respect to the motion picture ATHENA, who was the distributor of that film?

A. Loew's, Incorporated.

Q. What were the weekly rentals paid to Loew's, Incorporated for the exhibition of that film?

A. First week, $5,196;
Second week, $3,382;
Third week, $2,074;
Fourth week, $1,772.

Q. The total?

A. $12,424.

* * *

(1431)

Q. On the motion picture HIT THE DECK were you employed by the Viking at the time that picture played?

A. Yes, sir.

Q. Let me ask you this question, Mr. Wren, what is an adjustment in film rental?

A. A reduction in the price or the terms contained in the contract, or a reduction in playing time, or a combination of both.

Q. Well, just an adjustment, not an adjustment generally, just an adjustment in film rental.

A. In the film rental? A reduction in the price.

Q. Now, on the picture HIT THE DECK, Mr. Wren, what did the Viking pay to the distributor of that film in film rentals?

A. $25,098.

Q. Did the Viking sustain a profit or a loss on HIT THE DECK?

* * *

(1439)

The Witness: A loss.

By Mr. Sawyer:

Q. Did you ask for an adjustment?

A. We did.

Q. From whom?

A. Mr. Louis Formato, the branch manager of Loew's Incorporated.

Q. Did you obtain an adjustment?

A. We did not.

* * *

Q. (continuing) On the motion picture GLASS SLIPPER, Mr. Wren, what rental did you pay the distributor for the privilege of exhibiting that film at the Viking Theatre?

A. $17,646.

(1440)

Q. Did you lose money or make money on that exhibition?

* * *

The Witness: We lost money on the engagement of the GLASS SLIPPER.

By Mr. Sawyer:

Q. Did you ask for an adjustment on that picture?

A. We did.

Q. Did you obtain an adjustment?

A. No, sir, we did not.

Q. Now, Mr. Wren, on the motion picture shown at the Viking named THE PRODIGAL—

* * *

(1441)

Q. Who was the distributor of that motion picture?

A. Loew's Incorporated.

Q. What rental did you pay to Loew's Incorporated for the exhibition of that film?

A. $28,501 on a $37,500 guarantee.

Q. Did you ask for an adjustment on that picture?

A. We did.

Q. Did you sustain a loss or make a profit on that picture?

A. A loss.

Q. Is there a portion of money still in dispute between Viking and Loew's with respect to that picture?

A. There is.

Q. Now, on the motion picture WIZARD OF OZ, Mr. Wren, who was the distributor of that motion picture?

A. Loew's Incorporated.

Q. How much did you pay for the exhibition of that picture WIZARD OF OZ for one week?

A. $2227.

Q. Did you lose or make money on the exhibition of that picture?

A. We made money after the adjustment was granted. We asked for and were granted an adjustment on the terms.

Q. How much.

(1442)

A. From 40 per cent to 25 per cent.

Q. What was the amount finally paid to the distributor?

A. $2227.

Q. So that amount you gave us is after the adjustment?

A. Yes, sir.

Mr. Nizer: Is that Loew's?

Mr. Sawyer: Loew's.

By Mr. Sawyer:

Q. Now, on the motion picture NOT AS A STRANGER, did you ask for an adjustment on that picture?

A. No, sir.

Q. On the motion picture DESERT SANDS did you lose or make money?

A. We lost money.

Q. Who distributed that picture?

A. United Artists Corporation.

Q. Did you ask for an adjustment?

A. We did.

Q. Were you granted an adjustment?

A. Yes, sir.

Q. In what amount?

A. Ten per cent on the first week, from 40 to 30 per cent, on the second week from 30 per cent to 20 per cent.

Q. What did that amount to in dollars and cents?

(1443)

A. $986.

Q. What film rental did you ultimately pay the distributor?

A. $2600

Q. Now, on the motion picture GIRL IN THE RED VELVET SWING, did you lose or make money on that picture?

Mr. Nizer: What company?

The Witness: Twentieth Century-Fox.

Mr. Sawyer: I am sorry. Twentieth Century-Fox.

The Witness: We lost considerable money, sir.

By Mr. Sawyer:

Q. And what did you pay to the distributor?

A. $27,500 guarantee.

Q. And was that the full amount of the guarantee you had undertaken?

A. Yes, sir.

Q. Did you ask for an adjustment?

A. We did.

Q. Whom did you ask for the adjustment?

A. Mr. Sam Diamond, the local branch manager, as well as Mr. Dickstein and Mr. Moskowitz of the New York office of Twentieth Century-Fox Film Corporation.

Q. Were you granted an adjustment?

A. No, sir.

Q. On the motion picture BIG KNIFE, Mr. Wren, did you lose

(1444)

money or make money on that picture?

A. We lost money.

Q. Who made that picture?

A. United Artist.

Q. And what did you pay on that picture, Mr. Wren?

A. A guarantee of $22,500.

Q. Was that the guarantee in the contract?

A. Yes, sir.

Q. Did you ask for an adjustment?

A. We did.

Q. Whom did you ask?

A. Mr. John Turner of the United Artists.

Q. And did you get an adjustment or not on that picture?

A. No, sir.

• • •

(1445)

Q. The four pictures as a whole, Mr. Wren, did you lose or make money on them as a group?

A. We lost.

Q. Did you seek an adjustment on those pictures?

A. Yes, sir.

• • •

Q. Did you have a meeting with anyone with respect to these pictures?

A. Yes, sir.

Q. With whom did you meet?

A. Mr. Peter Dana.

Q. Who was present at the meeting?

A. Mr. Edward Heiber, the branch manager, and Mr. Edward Potash, sales manager of the local branch.

• • •

(1446)

Q. Was Mr. Sley also present?

A. Yes, sir.

Q. Where did the meeting take place?

A. At the Universal branch office in Philadelphia located at 13th and Vine Streets.

Q. What happened? When I say "what happened" what did you say and what did Mr. Dana or others employed by Universal say?

A. Mr. Dana came to Philadelphia to ask that we remit in full the guarantee contained in the contract for these four pictures, that is, $85,000, and we told Mr. Dana that he had promised us an adjustment on the pictures.

He said: Well, I have offered you $15,000, but I understand that you fellows are bringing an antitrust action, and I don't intend to give anybody any money that intends to sue my company.

* * *

(1447)

Q. Did you obtain then any adjustment as to the four Universal pictures?

A. No, sir, we did not.

Q. Now, on the motion picture THE MAN IN THE GRAY FLANNEL SUIT, Mr. Wren, did you lose or make money on that motion picture?

A. We lost money.

Q. What did you pay the distributor in rental for that picture?

A. $106,500 guarantee.

Q. Did you ask for an adjustment?

(1448)

A. Yes, sir.

Q. Did you obtain it?

A. No, sir.

Q. Did that picture become the subject of a lawsuit?

A. Yes, sir.

Q. Is that guarantee now paid in full?

A. Yes, sir.

Q. What were the terms of the license with respect to that? What guarantee was called for?

A. $106,500.

* * *

(1449)

Q. Did you have any schedules with respect to the time as to the payment of this guarantee to Twentieth Century-Fox?

A. We agreed to pay $10,000 a week.

Q. Did you pay $10,000 the first week?

A. Yes, sir, less Twentieth Century-Fox's share of the advertising.

Q. The second week?

A. Yes, sir.

Q. The third week?

A. Yes, sir.

Q. The fourth week?

A. Yes, sir.

Q. The fifth?

A. Yes, sir.

Q. The sixth?

A. Yes, sir.

Q. The seventh?

(1450)

A. Yes.

Q. The eighth?

A. Yes.

Q. How about the ninth week?

A. Part of the ninth.

Q. What happened at that point?

A. At that point Twentieth Century-Fox, through Mr. Sam Diamond, told us that they were not going to participate in any advertising after the tenth week of the engagement.

Q. What did you do?

A. We discussed the matter with Mr. Diamond as well as his New York advertising department, and the New York executives such as Mr. Dickstein and Mr. Moskowitz, and were told that they were not going to participate in any advertising if we held the picture longer than ten weeks, that we had bid the picture a minimum of ten weeks at this fixed guarantee, and that is where they thought their obligation ended.

(1451)

Q. Now, were you playing the picture additional weeks?

A. Yes, sir, we played it 12 weeks instead of 10.

Q. Did you pay the balance of the guarantee for the tenth week?

A. Yes, sir.

Q. At that time?

A. No, after the suit, after they brought action.

Q. Very well. Did they pay, as a result of that action, the advertising for the 11th and 12th weeks as you insisted?

A. They did.

Q. Now, KISS BEFORE DYING, Mr. Wren, did you lose or make money on that picture?

A. Lost money.

Q. From whom was that picture licensed?

A. United Artists Corporation.

Q. Did you ask for an adjustment?

A. Yes, we did.

Q. Did you obtain it?

A. No, we did not.

Q. Who did you ask, Mr. Wren?

A. Mr. Tunick, United Artists.

Q. With respect to the picture REBEL IN TOWN, from whom did you license that motion picture?

(1452)

A. United Artists Corporation.

Q. Strike REBEL IN TOWN. I forgot to ask this question.

On KISS BEFORE DYING, Mr. Wren, what did you pay the distributor in film rental for that picture?

A. $2,305.

Q. Now, you have testified with respect to REBEL IN TOWN. Did you lose or make money on that picture?

A. We lost money.

Q. Did you ask for an adjustment?

A. We did.

Q. Did you obtain an adjustment?

A. We did not.

Q. What film rental did you pay for the exhibition of that picture?

A. $1,493.

Q. Now, with respect to the picture RUN FOR THE SUN, Mr. Wren, did you lose or earn money on the exhibition of that picture?

A. We lost money.

Q. Did you ask for an adjustment?

A. We did.

Q. From whom?

A. Mr. Tunick, United Artists Corporation.

Q. Did you obtain an adjustment?

(1453)

A. We did not.

Q. What did you pay in film rental?

A. $4,795.

Q. As to the picture BANDIDO, from whom did you license that picture?

A. United Artists Corporation.

Q. Did you lose or make money on its exhibition?

A. We lost money.

Q. Did you ask for an adjustment?
A. We did.
Q. Did you obtain an adjustment?
A. No, sir, we did not.
Q. What did you pay?
A. $5,000 film rental.
Q. On the motion picture BIGGER THAN LIFE, from whom did you license that motion picture?
A. Twentieth Century-Fox Film Corporation.
Q. Did you make or lose money on its exhibition?
A. We lost money.
Q. Did you ask for an adjustment?
A. We did.
Q. Did you obtain an adjustment?
A. We did not.
Q. Who did you ask at Twentieth Century-Fox for the

(1454)

adjustment?
A. Mr. Samuel Diamond, the branch manager.
Q. On the showing of the double feature QUEEN OF BABYLON and ABDULLAH'S HAREM, did you lose or make money on that picture, Mr. Wren?
A. We lost money.
Q. Did you ask for an adjustment?
A. We did.
Q. Did you obtain an adjustment?
A. No, sir.
Q. How much did you pay the distributor for the rental of those films?
A. $1,176.
Q. On the motion picture LOST WAGON, who distributed that picture, Mr. Wren?
A. Fox, Twentieth Century-Fox Film Corporation.

Q. Did you make or lose money on the exhibition of that film?

A. Lost money.

Q. Did you ask for an adjustment?

A. We did.

Q. Were you granted the adjustment?

A. We were not.

Q. How much did you pay the Twentieth Century-Fox Film

(1455)

Corporation for the rental of that film?

A. $3,593.

* * *

(1456)

Q. Now, on THE POWER AND THE PRIZE, Mr. Wren, this was produced by whom?

A. It was distributed by Loew's, Inc.

Q. Did you earn or lose money on that picture?

A. We lost money.

Q. Did you ask for an adjustment?

A. We did.

Q. Did you obtain it?

A. We did not.

(1457)

Q. How much film rental did you pay for the licensing of that picture?

A. $4,748.

Q. Now, on the picture TEEN-AGE REBEL, who distributed that picture?

A. Twentieth Century-Fox Film Corporation.

Q. Did you earn or lose money on that picture?

A. We lost money.

Q. Did you ask for an adjustment?

A. We did.

Q. Was it granted?

A. No.

Q. How much did you pay in film rental for the licensing of that motion picture?

A. $3,137.

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(1476)

The Court:

• • •

Suppose I say to you, Mr. Sawyer, you should put in your case with Mr. Wren, everything that you can, including damages. I have said so far as the incompetency of this statement showing the grosses and computations that I will reserve ruling pending the submission of briefs.

I want to know now what other questions do you have with respect to damages that you say you want

(1477)

to defer asking Mr. Wren.

Mr. Sawyer: I want to defer asking him, for instance, when we put down here the grosses of these other theatres, whether if the Viking had obtained product of comparable quality to the other theatres it could have earned the same comparable grosses. That is inherently bound up with this method of doing it.

• • •

(1481)

Mr. Sawyer: I propose to go into this schedule now and I propose to ask him one question, which the defendants will rebut, but it is a question which is the necessary question to have him asked and to be on the record, and that is, if the Viking had obtained product comparable to that obtained by the defendants would it have been

able to gross as well as the defendant theatres and would they have been able to average these kind of grosses.

• • •

(1494)

Mr. Sawyer: Your Honor, then the only remaining question to be put in the record is the number of seats in the theatres which are balcony seats. Since I have the figures for some, and while we were up there the rest was supplied and or agreed to, I will just read that.

The Mastbaum Theatre has 1889 of its seats in the balcony.

The Stanley Theatre has 1482 of its seats in the balcony.

The Stanton has 335 of its seats in the lower balcony, 255 in the upper balcony, for a total of 590 seats.

The Fox had 1089 of its seats in the balcony and loge, both balcony and loge being on the second floor.

Mr. Young: You take a stairway up. It is divided 149 and 940.

Mr. Sawyer: It is 149 and 940, for a total of 1089.

The Randolph has 402 seats in the balcony, 252 seats in the loge, there being therefore 654 of its seats on the second floor.

The Goldman Theatre has 200 of its seats in the balcony.

The Midtown has none of its seats in the

(1495)

balcony.

Have I left any out?

Mr. Ward: What about the Viking?

Mr. Sawyer: The Viking Theatre has 70 seats in the balcony.

* * *

CROSS-EXAMINATION

By Mr. Nizer:

Q. Mr. Wren, until you took your job with Sley's Viking Theatre, you had never bought pictures for a first-run theatre in a large city like Philadelphia, had you?

A. Only in assistance with Mr. Adams in Newark, New

(1496)

Jersey, at the Paramount and Adams Theatres.

Q. Even that assistance was with respect to a theatre which followed New York?

A. Yes, sir.

Q. It was not on national release like Philadelphia?

A. Right, sir.

Q. So that you had never, until you joined Mr. Sley at the Viking Theatre, bought any pictures on a national release basis first-run, had you?

A. No, sir.

Q. Prior to joining Mr. Sley you had no personal experience in bidding for any first-run downtown theatres, had you?

A. No, sir.

Q. When you joined Mr. Sley you knew that there were 11 other theatres competing with him who were playing first-run pictures, did you not?

A. Oh, sure.

Q. And you knew that there were eight leading motion picture companies that were distributing motion pictures to supply to those 11 — including the Viking, 12 theatres first-run; right?

A. Yes, sir.

Q. And among those eight was RKO Pictures which later

(1497)

dropped out as a company; is that right?

A. Yes, sir.

Q. When Mr. Sawyer was examining you you told His Honor and the jury that you asked for pictures of various companies and that on certain occasions you would say, "I want to bid or negotiate for this picture," and you would never hear from them again. Do you recall that testimony?

A. Yes, sir.

• • •

(1498)

Q. Can you recall whether you gave as an illustration to Mr. Sawyer just a few days ago the picture FIRST TRAVELING SALESLADY as an illustration of the fact that you askd the company to bid or negotiate and they paid no attention to you and ignored you?

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(1500)

A. Well, what I recall is that I stated that RKO had solicited an offer, and we refused to bid without a screening. They subsequently screened the picture, and we advised we would like to negotiate, and I did not hear from them.

Q. You never heard from them?

A. No, sir.

Q. Can you recall your so testifying?

A. Yes, sir.

Q. When you asked for a screening, did the RKO reply to

(1501)

that and arrange such a screening for you?

A. I know I saw the picture. I don't know how they replied.

Q. Did RKO extend your time to make a bid or negotiate for that picture?

A. I don't recall.

Q. You don't remember that?

A. No, sir, I do not.

Q. But you do recall, and you are sure, that RKO never—that you never heard from them after you said, "I do want to negotiate or bid for it"; is that right?

A. That's right, sir.

Q. Now, isn't it a fact that Mr. Zagrans, the branch manager of RKO, repeatedly telephoned you after your telegram and asked you to please come in so that he could negotiate with you?

A. No, sir.

Q. Isn't it a fact that when you failed to return those calls he wrote you to the effect that he has been trying to get you on the phone, and you are not replying to him, and will you please answer the phone so that he can negotiate with you?

A. I don't recall that, sir.

Q. You don't deny it?

(1502)

A. I don't recall it. I don't remember any such letter.

Mr. Sawyer: May I see that, please?

Mr. Nizer: Yes. (Handing document to opposing counsel.)

By Mr. Nizer:

Q. I show you this letter and ask you if that doesn't indicate to you that they wrote you to that effect?

A. That is what they say here, sir, but I don't recall this letter.

Q. You never received this letter?

A. Not to my knowledge, no, sir. This is the first time I have ever seen this letter.

Mr. Nizer: I ask to have this letter marked for identification, please.

(Photostatic copy of a letter from RKO Radio Pictures, Inc., dated July 25, 1956, to Mr. Jay Wren, was marked for identification as D(RKO)-1.)

By Mr. Nizer:

Q. I am asking you about the original of this photostat.

A. That's right.

Q. You tell me that this is the first time you have ever seen the contents of this letter, either in the original or in a photostat; is that right?

A. That's right, sir.

(1502a)

Q. Who is Miss Julia Hunter?

A. My secretary.

The Court: We will take a ten-minute recess.

(A short recess was taken at this time.)

(1503)

By Mr. Nizer:

Q. I show you the document which has been marked Defendants' Exhibit 1 for identification, and I take it that you still say you never saw the original or any copy of that?

A. I don't recall seeing this, no, sir.

• • •

Q. Is it not a fact that your secretary reported to you that Mr. Zagrans of RKO was making calls asking to negotiate with you?

A. If that was the case, Mr. Nizer, I would have called Mr. Zagrans.

Q. What is the name of your secretary? Julia Hunter?

A. Mrs. Julia Hunter.

• • •

(1506)

Q. Did you receive a letter with respect to the screening of this same picture THE FIRST TRAVELING SALESLADY?

A. I think I explained—I don't recall how I knew about the screening, but I did attend the screening.

Q. I didn't ask you that. Did you receive a letter, is my question.

(1507)

A. I don't recall how we found out about the screening.

Q. I show you this document and ask you if that refreshes your recollection as to whether you got a letter inviting you to the screening.

A. This is a letter having to do with the screening. Yes, I assume that I received the letter telling me that there was a screening.

Q. So this letter you do recall and admit receiving?

A. No, I do not. I say this is a letter with reference to the screening of THE FIRST TRAVELING SALESLADY. I told you I saw the picture. I don't remember whether I found out through this letter or how.

Q. My simple question is, do you or do you not recall receiving that letter, the original of it?

A. I do not.
Q. What?
A. I do not.

Mr. Nizer: I ask to have it marked for identification D-2.

(Copy of letter from C. Zagrans to Mr. Jay Wren dated July 11th, 1956, was marked Defendants' Exhibit D-2 (RKO) for identification.)

And I respectfully request Mr. Sawyer to see if he can find the original of that.

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(1509)

Q. I ask the witness again: Did you receive the original of this letter? Do you recall that you did or you didn't?

A. I don't recall, no, sir.

Mr. Nizer: Then I ask counsel to see if he can find the original, so we will know whether he got such a letter.

Mr. Sawyer: He doesn't deny getting, Your Honor.

The Court. I will permit that request. I think it has something to do with what Mr. Nizer said as to how good his recollection is.

By Mr. Nizer:

Q. Now, thereafter, Mr. Wren, did you ask for the time to make an offer for THE FIRST TRAVELING SALESLADY to be extended so that you could make an offer?

A. I don't recall doing that.

Q. I show you this letter and ask you if that refreshes your recollection that the time to extend the

making of an offer was granted to you by letter. Did you get that one?

A. I don't recall having made a request to have the due date extended, sir.

Q. And therefore your answer to my question is what? Did you get the original of that letter or no?

(1510)

A. I don't recall.

Mr. Nizer: I ask that it be marked for identification, please, as Defendants Exhibit 3.

(Copy of letter from C. Zagrans to Mr. Jay Wren dated July 10th, 1956, was marked Defendants' Exhibit D-3 (RKO) for identification.)

And I respectfully request counsel to see if he can find or whether he has the original of this letter (handing to Mr. Sawyer).

By Mr. Nizer:

Q. Did you thereafter advise Mr. Zagrans of RKO that you did not care to submit any bids on THE FIRST TRAVELING SALESLADY?

A. I don't remember that, sir.

Q. Did you advise them that you would care to negotiate but not to make a bid? Does that bring back anything to you?

A. I think I did. I said I wanted to negotiate.

Q. Did you send any communication to that effect to RKO?

A. We usually did.

Q. I show you this and ask you whether this is a copy of the document you sent to RKO to that effect.

A. It is.

Q. So that the original of that particular photostat you

(1511)

recall you sent to RKO; is that right?

A. That is the type of a wire I would send, yes.

Q. No, I didn't ask you whether that was the type of wire you would send. I am asking you a very direct question: Did you send the original?

A. I assume I sent this wire. It has my name on it.

Mr. Nizer: I offer it in evidence.

Mr. Sawyer: No objection, sir.

The Court: It will be received.

(Copy of telegram from Jay Wren to Mr. Charles Zagrans was marked Defendants' Exhibit D44 (RKO) for identification.)

Mr. Nizer: May I read it to the jury, Your Honor? It is very brief.

The Court: You may.

Mr. Nizer: This is a telegram, Western Union, from Viking Theatre, addressed to Mr. Charles Zagrans of RKO Radio Pictures, and the address?

"Re your solicitation letter of July 3, 1956 and your subsequent letter of July 10, 1956, this is to advise you that the Viking Theatre does not wish to submit an offer for a license to exhibit first run Philadelphia the motion picture, THE FIRST TRAVELING SALESLADY, but will negotiate for the first run showing

(1512)

of this attraction.

"Kindest regards.

"Jay Wren."

Q. I observe that you refer in this telegram to their solicitation of July 3, and there, RKO's, subsequent letter of July 12. You observe that?

A. Yes, sir.

Q. Does that refresh your recollection that you received letters from RKO?

A. I must have, or I wouldn't have put it in there, sir.

Q. Do you want to change your testimony of a few moments ago that you didn't recall receiving any letters from them?

A. No, sir.

• • •

(1513)

Q. Mr. Wren, it is a fact now, now that I have shown you Defendants' Exhibit 3, it is a fact that you recall that you received those prior letters from RKO about which some of them you said you had no recollection one way or the other; is that right?

A. Only in so far as I say to acknowledge receipt of the subsequent letter as well.

Q. Yes.

A. I still do not know how we arranged to screen the picture. I told you I did see the picture TRAVELING SALESLADY. I have testified that I offered to negotiate for the picture.

Q. Now, that is not responsive to my question, so I will have to repeat it, and I wish you would address yourself to my question. Does Exhibit 3, in which you refer to prior solicitations and subsequent letter of RKO, refresh your recollection to the effect that you did receive the letter which you said you had no recollection about before?

A. I admit having received the letter in the telegram.

Q. Yes.

(1514)

A. Now, whether it is the same—

Q. That is an answer, and therefore would you say that the original of that letter would be in your files somewhere, the RKO letter?

A. If we received it, it would be.

Q. And your referring to RKO's solicitation in subsequent letters, two of them, would indicate that you did receive it, wouldn't it?

A. It would indicate that I received—

Q. Just answer my question, can't you, directly?

A. Yes, with an explanation.

Q. What is your explanation?

A. It would indicate that I received the solicitation letter and subsequently received another letter and that I replied in kind by saying that I had seen the picture, I did not wish to bid, but that I would like to negotiate.

Q. And therefore the simple answer to my question is yes, isn't it?

A. Well, the simple answer is the one I just gave you.

Q. No, that isn't simple. My question again is, do you now recall that the letters I have been calling for are letters that you did receive and that they must be in your files?

Mr. Sawyer: Objection, Your Honor. He

(1515)

keeps saying "letters," and we are talking about two different classes of letters.

The Court: Well, as I understand it, you say "Yes," with the explanation that you gave.

The Witness: Whatever is contained in the telegram I evidently received, Your Honor.

By Mr. Nizer:

Q. Did you thereafter have other conversations with Mr. Zagrans about THE FIRST TRAVELING SALESLADY?

A. I don't recall any further conversations with Mr. Zagrans. I don't recall any conversations with Mr. Zagrans with respect to THE FIRST TRAVELING SALESLADY.

Q. And you still say that after you told him you wanted to bid or negotiate, that was the end of it, you never heard from him? That is still your testimony?

A. That is the last I remember from him, yes, sir.

Q. I show you this document purportedly signed by you and ask you if you recall sending the original of that.

* * *

(1516)

Q. My question is, first—and then you may object if you wish—is that an authentic copy of a document that you recognize?

A. May I read this telegram, sir?

Q. Yes, if you will answer my question.

A. Yes, sir.

Q. What is your answer to my question?

A. Yes, sir.

Mr. Nizer: I offer it in evidence.

* * *

(1517)

Mr. Nizer: All right, I will take your reading of it. I don't see it. I will show it to the jury.

"July 10

"Re your solicitation letter of July 3, 1956 covering the motion picture, THE FIRST TRAVELING SALESLADY.

"As you know from previous correspondence, the Viking Theatre is unable to submit offers for a license to exhibit first-run Philadelphia any motion pictures which have not been screened at a trade showing.

"Again, the Viking Theatre management requests that they be afforded the opportunity to witness showings of any and all attractions for which RKO Radio Pictures, Inc. solicits offers for first-run exhibition in Philadelphia.

"Jay Wren."

Q. Now, it was after this letter Defendants' Exhibit 5 that you did request a showing and screening and they arranged one for you. This is the original document, the first solicitation.

(1518)

A. We asked to look at FIRST TRAVELING SALESLADY.

Q. And after that you asked for time in which to submit an offer and they extended your time?

A. I don't recall asking for time to submit an offer. I have told you that, Mr. Nizer.

Q. In other words, the document here which is now marked Defendants' Exhibit 3 for identification, "Please be advised that the due date for offers of THE FIRST TRAVELING SALESLADY has been extended from July 10 to July 18" does not ring a bell with you at all?

A. That isn't my signature. I didn't say that.

Q. Please answer my question instead of arguing, Mr. Wren.

A. It doesn't ring a bell.

Q. Let me repeat my question, and be good enough to answer it. Then if you want to say anything else, I will not object. Now will you listen to my question.

A. Gladly, sir.

* * *

(1521)

Q. Does the letter which I have just read to you refresh your recollection that you made a request to extend the time to submit offers, which was granted in that letter?

A. It does not.

Q. You say, then, that they, out of the clear blue, just advised you that they would extend the time for offers without your making the request? Is that your position?

A. Yes, with an explanation. In all probability the extension—

Mr. Nizer: No, no, I move to strike out as not responsive what the probabilities are.

Mr. Sawyer: The witness may explain, Your Honor.

Mr. Nizer: I don't think that is an explanation.

The Court: "In all probability" is rather vague. I will permit the explanation.

The Witness: In all probability the bid due date, the original bid due date, was prior to the screening of the picture and that is the reason they automatically extended it. I never phoned up to ask—

(1523)

Q. Mr. Wren, your present position then is that so far as your present recollection is concerned, you are telling this Court and jury that you did not make a request to extend the time to submit offer; is that correct, so far?

A. Yes, sir.

Q. And you are also telling this Court that all this letter shows to you is that they extended the time for you to submit an offer voluntarily and without your asking it?

A. Right, sir.

Q. Now, when you testified at page 1160, in answer to Mr. Sawyer's question, as follows:

> "Advised RKO, through its branch manager, Mr. Charles Zagrans, we would like to negotiate for the picture.
>
> "Q. Did you ever get any reply to that?
>
> "A. No, sir."

At least you got a reply, if it wasn't a reply some notification that the time would be extended for you to negotiate, didn't you?

A. Yes. I got a reply but no—

Q. No. Please answer my question directly and don't argue with me. Counsel will have a chance to ask you more questions, you see.

(1524)

A. Yes, sir.

* * *

(1527)

Q. I read to you from the—Did you make a deposition in this case which under oath you testified long before this trial began about the FIRST TRAVELING SALESLADY?

A. I did.

Mr. Sawyer: What page, please?

Mr. Nizer: 607 and 8.

Mr. Sawyer: Give me a minute to get it, please.

By Mr. Nizer:

Q. "We tried to negotiate"—

Mr. Sawyer: May I read it first?

(Handing to Mr. Sawyer.)

(1528)

By Mr. Nizer:

Q. Were you asked the following questions and did you make the following answers?

"A. We tried to negotiate for a picture called the FIRST TRAVELING SALESLADY.

"Q. When you tried to negotiate just what did you do?

"A. We first advised them without a screening we would not submit an offer. That was on the 10th of July. Subsequently they screened the picture, told us the picture was available July 18. We advised them that we were willing to negotiate for the picture. We never heard from them and the picture opened at the Goldman Theatre the 12th of December, 1955."

Did you make that answer to that question?

A. Yes, sir.

Q. And isn't it a fact, Mr. Wren, that you did hear from RKO and that this answer was incorrect?

A. No, sir.

Q. Isn't it a fact that you received two letters from RKO saying, "We have been trying to get you on the phone repeatedly and we cannot get you in. We have left messages with Miss Julia Hunter, your secretary."

(1529)

Didn't you get such a letter from RKO?

A. No, sir.

Q. And isn't it a fact that thereafter Mr. Zagrans called you again and wrote you again and said, "We have been unable to get you. We would like to sell you this picture"?

A. According to what you showed me, that is the truth. But I don't recall any letters nor did Mr. Zagrans reply to my telegram saying that he would negotiate with me for the FIRST TRAVELING SALESLADY.

Q. According to what I showed you, that is the truth, you just said. According to what I showed you, you said that is the truth, didn't you, a second ago?

A. What is the truth is that he did not reply to my telegram re negotiating for FIRST TRAVELING SALESLADY. That is the truth.

Q. If the originals of the letters I showed you were received by you and were in your files, and these copies come from your file, then you are mistaken, aren't you?

A. About his contacting me about negotiating, I am not mistaken. He never contacted me after I sent wires saying I would like to negotiate for the FIRST TRAVELING SALESLADY.

Q. Now, will you please listen to my question again.

If those letters which I showed you, and which you say you never saw, were received by you and were in your

(1530)

files, and these photostats are copies from your files, then you are mistaken about his not having communicated with you, aren't you?

Just answer that first.

A. I did not say he did not communicate with me. I have never said he did not communicate with me. I said I learned about a screening. How, I do not know. I said that—

Q. Mr. Wren, please do not do this over and over again. We will progress much better if you will please direct yourself to my question and then you can say anything when your counsel asks you to develop it. Will you please do that.

I do not wish to move to strike out your answers each time but we are trying to save time.

A. Right, sir.

Q. My question now is that do you now concede that he did communicate with you?

A. Prior to my telegram—

Q. Not prior. Did he communicate with you telling you that he has been trying to get you on the phone?

A. I don't recall having seen that letter.

Q. And if that letter, two letters were received by you and were in your file, and these are photostats from your file, would you say you were mistaken about your recollection?

A. I certainly would.

(1531)

Q. The last one was in July, the document I showed you. Here is one in August.

I ask you before I show you this document whether as late as August Mr. Zagrans wasn't still trying to get you on the phone and trying to negotiate with you for the picture the FIRST TRAVELING SALESLADY? I ask you that question first.

A. If the picture opened in July—

Q. No, no, no, not if anything. Answer my question.

Did Mr. Zagrans as late as August, a month later, still try to contact you for the purpose of dealing with you for this picture, is my question.

A. I don't recall.

Q. That is an answer. I show you this document and ask you if it refreshes your recollection.

A. If it is in my file, I must have gotten it.

Mr. Nizer: I offer it in evidence.

Mr. Sawyer: Your Honor, I don't think that is a sufficient foundation but I will undertake to do the same thing with this document as with the other letter. There is only one that is in dispute as to whether it was received.

Mr. Nizer: I don't agree with all those statements.

Mr. Sawyer: As to both of these documents,
(1532)

Mr. Steinberg and I will search the correspondence. If they exist, we will so state; if they do not, we will say we can't find them.

Mr. Nizer: The only thing before the Court, I respectfully submit, is my offer that this document be marked for identification.

Mr. Sawyer: Marked? You said in evidence.

Mr. Nizer: In evidence.

Mr. Sawyer: I object to its submission in evidence.

The Court: Why? He said he must have gotten it.

Mr. Sawyer: He says, "If it is in my files," he must have gotten it, Your Honor. But since he hasn't got any recollection of receiving it we don't know whether it is in his files or not. It may very well be. My information would be to guess that it probably is. But I don't think that we are ready at this point—I would assume that we would find it somewhere in his files.

By The Court:

Q. Do you recall having received this letter?

A. I do not, sir.

Q. You have no recollection about it?

A. I have said I don't recall getting any correspondence or

(1533)

any contact after the wire.

Q. You may have received it and you may not have received it?

A. That is right.

Q. And you have looked at it and you have no recollection of ever having received that; is that correct?

A. No, sir. That's right, sir.

* * *

(1534)

Q. Incidentally, Mr. Wren, did you go through your files before you testified in this case?

A. I would assume, yes.

Q. Did you also read your testimony in the deposition that you made previously thereto? Did you go over that one, too, you own testimony?

A. I would say so, yes.

Q. You did that several times, didn't you?

A. I may have; at least twice.

Q. At least twice. Do you recall you answered in connection with an early question that Mr. Sawyer asked you that you had done certain assistant booking at the theatres in Newark?

A. That's right.

Q. You said this was not an arduous task because I was, just like, they had a certain product. Do you remember that phrase?

A. Paramount and Republic product.

Q. That was exactly the same phrase that you used in your deposition a year and a half before. This was not an arduous task.

A. Right, sir.

Q. And so you had read very carefully your deposition in this case, had you?

(1535)

A. I told you twice at least.

Q. And you also read all through your correspondence and files in preparation for your testimony in this case, didn't you?

A. I would say anything pertaining to the case, yes, sir.

Q. And you still don't recall—withdrawn.

And you still don't recall, even after these few questions, you never recall these letters?

A. I do not. I recall the letter that I referred to in my telegram.

Q. No. I didn't ask you for anything else that you recall. We will have plenty of opportunity for your recollection.

A. Yes, sir.

Q. Isn't it a fact that with respect to other pictures with RKO, they similarly were in constant communication with you pleading with you to try to negotiate with you?

A. I think I have said I negotiated for TENNESSEE PARTNER.

Q. How about BEYOND A REASONABLE DOUBT, the picture entitled BEYOND A REASONABLE DOUBT?

A. I believe that is the one we had the phone conversation about, or DEATH OF A SCOUNDREL.

Q. Did you—

Mr. Sawyer: May I have the number?

Mr. Nizer: This is the interrogatories at
(1536)
page 4. There is no number to it.

By Mr. Nizer:

Q. Did you make the following sworn statement in your interrogatories:

"In the case of BEYOND A REASONABLE DOUBT, plaintiff requested the opportunity to negotiate for the picture but received no reply from RKO."

Did you make that statement?

A. If it is in there, I did.

Q. Now, that isn't correct, is it?

A. To the best of my knowledge it is correct, sir.

Q. I show you this telegram signed by yourself and ask you if you sent the original of that telegram.

Mr. Sawyer: Let me see it, please.

(Document is handed to counsel and then to the witness.)

The Witness: Yes, sir.

Mr. Nizer: I offer it in evidence. Maybe I can offer both together.

By Mr. Nizer:

Q. I show you this telegram from Charles Zagrans to you and ask you if you received the original of that, and I will put them together (handing to Mr. Sawyer at this time).

By Mr. Nizer:

(1537)

Q. Here, sir, will you look at this one?
A. May I ask the date of this one, Mr. Nizer?

Mr. Nizer: The date, I can't make it out. Mr. Sawyer—

Mr. Sawyer: I can. August 27.

Mr. Nizer: From now on you are our authority on this.

The Witness: If I received the wire he was contacted. I received the telegram.

(1538)

Q. I didn't ask you if you did something. You did something. Did you get that get, that wire?
A. Yes, sir.

Mr. Nizer: I offer these in evidence.

(Telegram J. Wren to Charles Zagrans, dated August 27, was marked Defendants' Exhibit 7 (RKO) for identification.

(Telegram Charles Zagrans to J. Wren, dated August 30, was marked Defendants' Exhibit 8 (RKO) for identification.)

Mr. Nizer: May I read these, Your Honor, please to the jury?

The Court: You may.

Mr. Nizer: August 27, 1956, from J. Wren to RKO. This is in the form of a telegram:

Re solicitation letter of August 17, 1956, this is to advise you that the Viking Theatre does not wish to submit an offer for a license to exhibit first run Philadelphia the motion picture BEYOND A REASONABLE DOUBT, but will negotiate for the first run showing of this attraction.

Kindest regards J. Wren.

This reply, now Defendants' Exhibit 8:

Following receipt your wire advising that you

(1539)

were willing negotiate for BEYOND REASONABLE DOUBT I have for the past two days tried to contact you but to no effect as no call back was given my phone messages. If you care to discuss this any further please advise when I can contact you.

Charles Zagrans, RKO Radio Pictures.

• • •

(1542)

Q. Did you when you received this Exhibit 8, the telegram saying—I have for the past two days tried to contact you, but to no effect, as no call back was given my phone messages—did you send any communication to RKO saying that is a lie, or, in substance, it isn't true? Did you in 1956 reply to that and say: You weren't trying to call me, why did you write me that? Did you do anything of that kind? Yes or no to that.

A. No.

Q. And when you testified under oath that although you wanted to negotiate you never heard anything from RKO and they ignored you, that isn't correct, is it? They didn't ignore you, they sent you a telegram.

A. Right, sir.

Q. And you want to take back that statement under oath that you made before, don't you?

A. No, sir, I do not.

Q. Do you still insist that they ignored you when you wanted to negotiate, though they wrote you a telegram which you now

(1543)

admit you received, saying, We have been trying to follow you up, why don't you give us a chance to talk to you—you still say that?

A. I say I may have called them and couldn't locate them, and because I didn't follow it up with a telegram doesn't make me wrong.

Q. You may have done lots of things. I am asking you what you did do. Did you—

A. I don't recall what I did if I received this wire, when I received this wire.

Q. When you received this wire you have no recollection of calling Mr. Zagrans, have you?

A. I don't have any recollection of not calling him either.

Q. Please answer my question: Have you any recollection of calling Mr. Zagrans?

A. I must have called him.

Q. Have you a recollection that you called him, not that you must have done? Have you a recollection that you called him?

A. If I received such a wire I called him.

Q. Please answer my question. It is a simple one.

A. Yes.

Q. Now you say, after one second ago when you said, I do not recall calling him, you now say you recall you did; is

(1544)

that right? Now you suddenly have a recollection you called him; is that correct?

A. If I received such a wire I called him.

Q. Have you any memoranda—that is merely a supposition on your part, isn't it? You have no recollection to that effect, have you?

A. If I received such a wire I called.

Q. Listen to my question: Not if you did something, my question is, do you recall doing it.

A. No, I do not.

Q. All right. And you certainly don't recall writing to him, do you?

A. No, sir.

Q. And does this help you recall that the documents we are about to look through your files for also came in which the same substance was stated in the letter. We have been trying to get you, we have left messages with your secretary, why don't you reply? Does that help to stir up your memory that that might have occurred too?

A. It does not.

* * *

(1546)

ELEVENTH DAY

(1548)

JAY WREN, recalled.

CROSS-EXAMINATION (Continued)

By Mr. Nizer:

Q. Mr. Wren, since the last session you have found the originals of the letters that I—

A. Yes, sir.

Q. —showed you, in your own file, today.

A. I found them in Mr. Steinberg's file in their office.

Q. And you had turned that file over to him?

A. No, I turned it over to our original counsel and they in turn turned it over to him.

Q. Now, I show you then the original letter which RKO sent you on July 25, 1956, and ask you if that is the letter you received on or about that date.

A. Yes, sir.

Mr. Nizer: Now, may I have the original, please, marked in evidence, Your Honor?

The Court: Yes.

(Letter from Mr. Zagrans to Mr. Wren dated

(1549)

July 25, 1956, was marked Defendants' Exhibits 9 (RKO) for identification.)

Mr. Nizer: Ladies and gentlemen, this is RKO letter, July 25, 1956, to Mr. Jay Wren, Viking Theatre, from Mr. Zangrans of RKO:

Dear Jay:

Following receipt of your wire of July 18, which you sent after looking at FIRST TRAVELING SALESLADY, I tried to contact you on the telephone to discuss this picture with you, but unfortunately in each instance you were out. The last time I called I talked to Julia Hunter and asked her to please have you call me, but have not as yet heard from you.

Would appreciate your giving me a call upon receipt of this letter.

With kind regards, I am

Sincerely yours,

By Mr. Nizer:

Q. The lady Julia Hunter referred to in this letter is who?

A. My secretary.

Q. Now, when you testified on Monday, when I asked you on cross-examination concerning this letter, at page 1502:

You never received this letter?

Not to my knowledge, no, sir. This is the

(1550)

first time I have ever seen this letter.

That was incorrect, wasn't it?

A. Yes, sir.

Q. You have also produced—the first letter I have just read to you, Defendants' Exhibit 9, is dated July 25, 1956, and the next letter is August 6, 1956.

I asked you if you received this letter at the time its date indicates.

A. Evidently, sir, because we found it in our files.

Mr. Nizer: May I have that marked in evidence?

(Letter from Mr. Zagrans to Mr. Wren dated July 25, 1956, was marked Defendants' Exhibit 10 (RKO) for identification.)

Mr. Nizer: With Your Honor's permission—

The other was July 25, this is August 6, from RKO, Mr. Zagrans, to Mr. Jay Wren, Viking Theatre:

Dear Jay:

I have been trying to get you on the telephone to further discuss the FIRST TRAVELING SALESLADY, which is available after August 25, but unfortunately have been unable to reach you.

Would like very much to discuss this further with you, feeling there may be room in the Viking Theatre on a picture of this nature, especially as I notice

(1551)

this week you are playing a couple of re-releases.
Regards,

Sincerely yours,

Radio Pictures,
Branch Manager,
Zagrans

So that between July 25, the first letter I have just shown you, sir, and August 6, 1956, you did not communicate with RKO in response to those letters or calls, did you?

A. Evidently not, sir.

Q. After August 6, when you got this letter you still did not communiate with Mr. Zagrans about this matter, did you

A. I can find nothing in the files about it, no, sir.

Q. Now, you testified under oath at an examination before trial, a deposition, as well call it—

A. Yes, sir.

Q. —did you not?

A. Yes, sir.

Q. You swore to it. At page 608 did you say in connection with this matter:

We advised them we were willing to negotiate for the picture, we never heard from them, and the picture opened at the Goldman Theatre on the 12th of December, 1955.

(1552)

A. Yes, sir.

Q. And that was incorrect when you swore to that?

A. Yes, sir. Now that we found this, right, sir.

Q. Isn't it clear now, sir, that far from your not having heard from RKO in their effort to sell you this

picture they were really chasing you by phone and letter, trying to get you to have an interest in the picture; isn't that correct now?

A. Yes, sir.

Q. You have no grievance about this picture at all now that you see these letters, have you?

A. No, sir.

Q. And you withdraw the grievance that you once asserted, don't you?

A. Yes, sir.

Q. When I read from your deposition, I would like to supply the date that you swore to that. On November 20, 1957.

Now, we also discussed the picture BEYOND A REASONABLE DOUBT. Do you recall I asked you about that?

A. Yes, sir.

Q. And you likewise testified under oath that you asked to negotiate for this picture and in effect you never heard anything from them, right?

A. Yes, sir.

(1553)

Q. Now we have a telegram which is in your file on the subject of BEYOND A REASONABLE DOUBT. I show you this telegram, sir.

• • •

Q. Well, is this the original of the telegram I showed you?

A. Yes, sir. That is the one we found in the files when we left here.

Mr. Nizer: May I have this original marked, please, sir?

(A telegram was marked Defendants' Exhibit 11 (RKO) for identification.)

By Mr. Nizer:

Q. Now, that telegram is annexed in your files to a solicitation letter from RKO Pictures, BEYOND A REASONABLE DOUBT, starring Dana Andrews, Joan Fontaine and Sidney Blackmer; is that right? Is that the original letter you received at the time?

A. I would say so, yes, sir.

(1554)

Mr. Nizer: I ask that that be marked in evidence, please.

(Solicitation letter dated August 17, 1956 from RKO Radio Pictures to Mr. Jay Wren re BEYOND A REASONABLE DOUBT was marked Defendants' Exhibit 12 (RKO) for identification.)

• • •

Q. Let me just ask you this, to save time:

Defendants' Exhibit 11, this telegram, without reading the whole thing, says:

Following receipt your wire advising that you were willing to negotiate for BEYOND A REASONABLE DOUBT.

(1554a)

So in this case you actually sent a telegram to RKO stating you wanted to negotiate for the picture?

A. You have it right there, sir.

(1555)

Q. I say you did, didn't you?

A. Yes, sir.

Q. Will you please answer my question.

Now, ordinarily in these business matters one doesn't send telegrams, one sends a letter or picks up the telephone, doesn't he, ordinarily?

A. Different procedures with different organizations, sir.

Q. And the reason that you followed the telegram procedure was that you were really trying to make a record of a claim that you once tried to get this picture, you sent a telegram?

A. No, sir, that is not the truth, sir.

Q. No? How far away is the RKO office from your office?

A. Oh, I guess ten minutes, 15 minutes.

Q. And when you received Defendants' Exhibit 11, in which RKO said about BEYOND A REASONABLE DOUBT, "I have for the past two days tried to contact you but to no effect, as no call-back was given my phone messages" did you then telephone?

A. I would assume I did.

Q. Do you know that you did?

A. No, sir, I do not.

Q. Do you remember the final request: "If you care to discuss this any further, please advise when I can contact

(1556)

you."

A. I didn't even remember the wire until we found it in our files, Your Honor—or sir.

Q. And therefore when you said that you had sent them a telegram but that they had ignored you and that was the end of it and you never heard about it, that was incorrect, too, wasn't it?

A. No, sir.

• • •

Q. On page 1542, last Monday, I asked you:

And you want to take back that statement under oath that you made before, don't you?

And you said: "No, sir, I do not" about BEYOND A REASONABLE DOUBT.

Now I ask you today, you are willing to take back that statement that you never heard from him?

A. Yes, sir.

Q. And you withdraw your complaint about that, don't you?

A. Yes, sir.

Q. During the period that you were associated with Mr. Sley and until the beginning of this lawsuit, November 13, 1956, RKO re-released about 19 pictures which played first run. Do you accept that, sir, without going through all the records? Does that sound right to you?

A. You said during the period I was associated with Mr.

(1558)

Sley. I am still associated with Mr. Sley, sir.

Q. I mean and up until the time of the beginning of the lawsuit, November 13, 1956. I am limiting it to the lawsuit period.

A. I see what you mean.

Q. Do you see what I mean?

A. Right.

Q. I understand that you still are.

Now, in that period RKO distributed, and which played first run, about 19 pictures. We take that from the release sheets. Will you accept that subject to check?

A. Right, sir.

Q. And of those 19, with the exception of the two pictures about which you have just withdrawn your claims, you never bid or negotiated for any RKO picture during this period with the exception of one, namely, TENNESSEE'S PARTNER, is that right, sir?

A. No, sir. How about the other one DEATH OF A SCOUNDREL?

Q. DEATH OF A SCOUNDREL, you say?

A. Yes, sir.

All right. I will take that for the moment. So with the exception of TENNESSEE'S PARTNER and DEATH OF A SCOUNDREL—

(1559)

A. Is MAN IN THE VAULT on that sheet, sir?

Q. I don't think so, sir, but you can have that subject to your checking during a recess and I will stand for any correction if you find one. I think this is quite right. But in any event, we have agreed for the present—

A. Yes, sir.

Q. —that with exception of you saw DEATH OF A SCOUNDREL and TENNESSEE'S PARTNER and the pictures that you have withdrawn your claim, you made no attempt to either bid or negotiate for any RKO picture. We are agreed on that, sir, aren't we?

A. Yes, sir.

Q. Now turning to Columbia Pictures, from the time that you joined Mr. Sley, which I would say is around February 1955—right? You really began January but you started your functions—

A. No, officially March 1st, but I started probably the first week in February.

Q. All right, we will take it at that approximate period.

A. Right, sir.

Q. And until July 1956. That is about a year and what, four months or so?

A. Yes, sir.

Q. Between that period you didn't bid for any Columbia

(1560)

pictures, bid or negotiate for any Columbia pictures except one, is that right?

A. PICNIC.

Q. That's right. Is my question correct with the exception of that one?

A. That's right, sir.

* * *

Q. Columbia Company is one of the top producing companies of the motion picture companies, isn't it?

A. It is one of the majors, yes, sir.

(1561)

Q. And among the pictures now that they released during this period for first-run Philadelphia which you did not show any interest in, either bid or negotiate, was THE LONG GRAY LINE with Tyrone Power and Maureen O'Hara?

A. That was before I came to the Viking Theatre, sir.

Q. But you know from looking back at the records that your company didn't attempt to negotiate for that, don't you?

A. No, I don't, sir.

Q. EDDIE DUCHIN STORY, with Tyrone Power and Maureen O'Hara, was that before you came or during—

A. No, that was during.

Q. And that—

(To Mr. Sawyer) If you will be good enough to give the witness the national film rentals that he was disposing of? I will read them off unless you wish to accept them.

Mr. Sawyer: You read them and I will check them.

Mr. Nizer: All right, thank you.

By Mr. Nizer:

Q. And that Columbia picture which you showed no interest in, later, by hindsight, of course, had a $4,694,000 national film rental, didn't it?

(1562)

A. The fact that no interest was displayed, Mr. Nizer, may have been because I had a picture.

Q. Exactly. I understand. You understand I am not—withdrawn. I won't argue with you, sir.

Whatever the reason was you refused actually in writing to either bid or negotiate for the picture, didn't you?

A. I probably wired them or phoned them and told them due to a prior commitment I could not submit an offer.

Q. And you testified in answer to Mr. Sawyer's question, if you were playing KISS BEFORE DYING—do you remember THE KISS THAT WASN'T WORTHWHILE, His Honor's observation about it?

A. His Honor's observation, yes, sir.

Q. That is the picture. United Artists.

A. Yes, sir.

Q. Do you recall that picture?

A. Yes, sir.

Q. Now, you were playing that in July 1956 and that, as you testified, only had a national film rental of $574,000, do you recall, sir?

A. Right, sir.

Q. And you testified that you had not been able to license two other pictures which turned out later to have larger

(1563)

national film rentals, namely, AWAY ALL BOATS and THAT CERTAIN FEELING. Do you recall tha testimony?

A. Yes, sir.

Q. So to make it clear, without getting confused with names and titles, you were playing a picture which you said was of a lower quality as judged by hindsight, its national film rental, and you were trying to get two other pictures which had somewhat higher national film rentals, as it turned out, yet at that very time in July 1956 you ignored Columbia's picture EDDIE DUCHIN STORY which had a $4,700,000 national film rental.

First I ask you is that a fact?

A. Not until I find out the availability of EDDIE DUCHIN STORY, sir.

Q. July. That is why I am giving it to you.

A. When was the picture bid, sir?

Q. July 1956.

A. It was bid July and due July?

Q. No, no. It was available for July '56, subject again to your checking.

A. But what was the bid due date on the picture? It may have been three months before, sir.

Q. Whatever it was, it was available at the very time that you say you couldn't get two other pictures to replace the

(1564)

weak picture, wasn't it? That is right, isn't it?

A. Not necessarily. The picture was available to be shown at that time but it may not have been bid at that time, and that is the all-important thing. It may have been bid in February for July or March or April. It doesn't mean it was bid at the same time that I acquired KISS BEFORE DYING.

(1565)

Q. So your present explanation as to why you had no interest in the Columbia $4,700,000 national

film rental picture, as it turned out later, is that is was offered so early that you didn't know where you would be in July. Is that your point?

A. No, sir. My point is that I must have advised Columbia in some manner, either telephone or something.

Q. May I interrupt you, please. Will you forgive me. I think counsel would agree, it is not what you might have done or must have done. We are interested in what you did.

Do you have any recollection as to what you did, then I will be glad to hear you. Have you any recollection of the dates?

A. I believe on the EDDIE DUCHIN STORY we advised due to a prior commitment.

Q. You believe?

A. Yes, sir.

Q. And by "prior commitment," you mean that you had another picture already booked in?

A. Evidently.

Q. And so you weren't trying to get two other pictures that you testified to, AWAY ALL BOATS and THAT CERTAIN FEELING at that time because you had a booking?

(1566)

A. AWAY ALL BOATS, sir, we discussed as something that was discussed in September, 1955, with Mr. Peter Dana, far before—

Q. I am talking about—

A. —AWAY ALL BOATS.

Q. I am talking about July, 1956.

A. So am I, sir.

Q. And do you tell me that the only reason now, as you can recall, your best recollection, is that the reason you didn't negotiate or bid for the EDDIE DUCHIN STORY is that it may have been offered earlier than July?

A. I say I don't know what the bid due date was.

Q. You don't know?

A. I do not know, sir. If I did I would tell you.

Q. Now, the picture that you played, KISS BEFORE DYING, you got that on July 3, 1956. Mr. Sawyer can check me. Will you accept that date?

A. July 3? Probably, yes, sir—negotiated.

Q. And before that in April did you send the original of this telegram to Columbia concerning the EDDIE DUCHIN STORY?

(Document is handed to the witness.)

The Witness: I sent this wire April 2nd.

By Mr. Nizer:

Q. That's right, April 2nd.

A. Right, sir.

(1567)

Q. 1956. That is several months before July, isn't it?

A. Yes, sir.

Mr. Nizer: I offer it in evidence.
Do you want to see this, Mr. Sawyer?

Mr. Sawyer: Yes.

(Document is handed to Mr. Sawyer.)

(Telegram dated April 2, from Jay Wren to L. Wurtele, Columbia Pictures, was marked for identification as Defendants' Exhibit 13.)

Mr. Nizer: May I read this, please, sir?

The Court: Yes.

Mr. Nizer: This is a copy of a telegram sent by Mr. Jay Wren to Columbia Pictures in connec-

tion with the EDDIE DUCHIN STORY inviting him to bid and negotiate for.

Re your solicitation letter March 20, 1956, the Viking Theatre does not wish to submit an offer for a license to exhibit first-run Philadelphia the motion picture, the EDDIE DUCHIN STORY, which you advise is tentatively available July, 1956. I would like you to continue to afford the Viking Theatre the opportunity to submit offers on all of your future releases. Kindest regards,

Jay Wren.

By Mr. Nizer:

Q. Now, during the period that you were not bidding or

(1568)

negotiating for Columbia pictures, that company also produced for first-run MAN FROM LARAMIE, with James Stewart and Donald Crisp. Do you recall that picture?

A. Yes, sir.

Q. And that was a three-million dollar picture as it turned out by national film rental. Mr. Sawyer will accept that.

Mr. Sawyer: Correct.

By Mr. Nizer:

Q. And you showed no interest in that picture which was also available in July, 1955, right?

A. Depending on the bid due date.

Q. So that in the whole period of your association with the Viking Theatre, from February, 1955, approximately, and until the November 13, 1956, dated, which is the beginning of this law suit, out of approximately 70 Columbia pictures—will you accept that approxi-

mation subject again to check?—70 Columbia pictures which were produced in that period and released, you only tried to get three pictures; is that right?

A. Well, I know about PICNIC.

Q. and SOLID GOLD CADILLAC?

A. SOLID GOLD CADILLAC.

Q. And YOU CAN'T RUN AWAY?

A. Yes, sir.

Q. YOU CAN'T RUN AWAY FROM IT.

(1569)

A. I got YOU CAN'T RUN AWAY FROM IT.

Q. That is what I say, of the only three you showed an interest in you got YOU CAN'T RUN AWAY?

A. Right, sir.

• • •

Q. Now, in addition to the Columbia pictures which I have read to you just some samples, which had a very high national film rental later, as it turned out—you know by "high" I mean three million, four million, those are high, aren't they?

A. Yes, sir.

Q. There were a good many Columbia pictures which you ignored and didn't want to bid or negotiate for which turned out to have a very low national film rental; isn't that true?

(1570)

A. Yes, sir. I was waiting for you to come to that.

Q. And here I am.

And those poor pictures, Mr. Wren, which you ignored played at your competitor's theatres, didn't they?

A. All 70 of them?

Q. No. I say a good many of them. Many of those you ignored played in theatres that were competing with you, the bad ones.

A. And many that I ignored they ignored.

Q. Now, will you be good enough to answer my question.

Mr. Nizer: Will you please read it to the witness.

(The reporter read the record as follows:)

"Q. No. I say a good many of them. Many of those you ignored played in theatres that were competing with you, the bad ones."

The Witness: Yes.

By Mr. Nizer:

Q. That is correct, isn't it?

Mr. Sawyer: May I interrupt you because I think, Mr. Nizer, that you didn't give, the way our records are, the correct date for the commencing of the motion picture EDDIE DUCHIN STORY which our records show started at the end of June, whereas the KISS BEFORE DYING thing was two weeks

(1571)

later.

Mr. Nizer: Suppose we hold that for redirect.

Mr. Sawyer: Yes, but I believe, Your Honor, that if questions are predicated—I just didn't have the record strictly before me, if questions are predicated to the witness, and just because this is difficult to follow, I realize that, but if they are predicated on facts which are already in evidence but not in accordance with the facts, then I would have an objection.

You see, as you look at this it changes the complexion of the whole thing.

Mr. Nizer: It doesn't change it. The availability was July. The picture was made available for July; it actually played—

Mr. Sawyer: It opened in June.

Mr. Nizer: The end of June, yes. But we had no interest. Somebody had it a little earlier.

Mr. Sawyer: Yes, because he was playing GRAY FLANNEL SUIT.

Mr. Nizer: Do you wish to argue it?

Mr. Sawyer: It makes it 7-11, Your Honor. He is playing GRAY FLANNEL SUIT, he is committed to that until July 11. That is to give the impression, therefore, that he

(1572)

didn't seek it in lieu of KISS BEFORE DYING.

Mr. Nizer: Let me develop the—

Mr. Sawyer: It opened June 28, at what theatre?

Mr. Nizer: Mr. Sawyer, do you mind if you don't testify now and if I conduct my examination? You will have another chance.

By Mr. Nizer:

Q. However, let me develop Mr. Sawyer's point so we have it clear.

Mr. Sawyer has stated that because you had the MAN IN THE GRAY FLANNEL SUIT, which was another picture, a Twentieth Century-Fox picture, you had no room in your theatre for these X-big pro-

ductions that I talked about. That is what he is saying. And that is a fact, isn't it, on many occasions?

A. Mr. Sawyer is wrong in this particular instance.

Q. Yes, I think so, too.

Mr. Sawyer: I stand corrected, Mr. Wren.

By the way, I think Mr. Wren ought to have this schedule though up with him.

* * *

(1573)

By Mr. Nizer:

Q. Let me ask you, Mr. Wren, as a theatre operator you keep a close record on what pictures play in your competing theatres, don't you?

A. Yes, sir.

Q. And you mark down all of the 10 or 11 theatres competing with you what they play on any particular week?

A. Yes, sir.

Q. And the titles of the pictures?

A. Yes.

Q. The companies?

A. Yes, sir.

Q. Right.

A. Not the companies, just the title and the play dates.

Q. The play date. Now, subject to your checking that so we don't have to waste time each time, since I have looked it up from the records, see if we can make a little headway.

I am now on the subject that you wanted me to come to, the poor Columbia pictures, those that had very low national film rentals as it turned out later, and I ask you whether you realize and know that your competing theatres

(1574)

were playing some of those poor pictures.

A. I would assume they were, yes.

Q. That you ignored. Now, let's see. Goldman's Midtown Theatre played Columbia's STORM CENTER in August, 1956. Will you accept that subject to your checking your own book?

A. I do accept it.

Q. And the national film rental of STORM CENTER, Mr. Sawyer will agree, is $185,000, right?

A. I do not know.

Mr. Nizer: Well, Mr. Sawyer will—

Mr. Sawyer: Yes, sir. I think you ought to let the witness explain why that is if he knows.

The Witness: STORM CENTER had to do with this particular area.

Mr. Nizer: No.

The Court: No. Just a minute.

By Mr. Nizer:

Q. $185,000 for STORM CENTER which your opponent, Mr. Goldman, played at the Midtown Theatre is lower than anything you ever played, isn't it, so far as you can recollect?

A. I don't know.

Q. You don't know that. I mean in national film rental. You don't know that?

A. I would say so, yes.

(1575)

Q. And then JOE MACBETH, which is a Columbia picture that turned out to be, shall we say, frankly, a lemon—

A. Yes, sir.

Q. —that played at the Goldman Theatre in May, 1956, for one week, didn't it? Your opposition.

A. If you say so, I will accept it.

Q. And that national film rental, as Mr. Steinberg is checking, was $180,000 for the whole nation. That's right, isn't it?

A. I will accept that.

Q. And that is lower than any picture you ever played, isn't it?

A. I would say so.

Q. And, incidentally, when a picture does $180,000 over the whole country, Columbia Pictures took a very big beating in that, that is obvious, didn't it? They lost much more money than anything we are talking about here, probably a million or two million dollars they lost on that one, didn't they?

A. Well, I can't speak for Columbia, sir, I don't know what they lost.

Q. As an exhibitor of some experience—

A. I would assume that they lost money.

Q. A lot of money, hundreds of thousands of dollars.

(1576)

Incidentally, you have asked for adjustments for relief on pictures that did badly where you knew that the motion picture distributor had lost a lot of money, didn't you?

A. So have my competitors.

Q. Yes, and so did you?

A. Yes, sir.

Q. And when you had a great success, when you made a large amount of money, did you ever go back to the distributor and say, "May I give you a little more? I came out much better than I expected." Did you ever do that is my question.

A. When was this, sir?

Q. Well, didn't you make over $23,000 on NOT AS A STRANGER, a United Artists picture, according to your official records?

A. Can I give you any more than 90 per cent, sir?

Q. I ask you after the 90 per cent whether you made $23,000 profit on that engagement.

A. I would assume so, if you say so.

Q. Did you go back to United Artists and say, "I would like to give you a little more. I did very well, $23,000 on one picture profit." Did you do that?

A. In twelve weeks?

Q. Did you ever do that?

A. No, sir, I have not.

(1577)

Q. For that matter, you don't know any other distributor who does, do you?

A. Yes.

Q. Who would go back and give more money?

A. Yes, sir.

[redacted]

A. I do.

Q. Your opposition?

A. No, sir. The gentleman that I worked for in Newark, New Jersey.

Q. Well, he is remarkable.

A. Mr. Adam Adams. He went back to Paramount and gave them a percentage on a flat picture.

Q. Wonderful. At least you don't know whether your opposition, Mr. Goldman or Stanley Warner, ever did that?

A. He doesn't confide in me.

Q. And in May, 1956, while Columbia's Goldman's Theatre—withdrawn.

In May, 1956, while Goldman's Goldman Theatre was playing JOE MACBETH, which had a national film rental of $180,000, you were playing the MAN IN

THE GRAY FLANNEL SUIT which had a national film rental of $3,600,000, weren't you, at that same time?

A. What was the play date, sir? JOE MACBETH?

(1578)

Q. JOE MACBETH, May, 1956.

Mr. Sawyer: How many weeks?

The Witness: Yes, sir.

Mr. Nizer: Right. There is a difference about the weeks, of course.

Please do not do that, Mr. Sawyer. I am not going to weeks. I am showing the kind of pictures between the theatres.

By Mr. Nizer:

Q. Now, the Midtown Theatre—incidentally, how large is the Midtown Theatre?

A. Just under a thousand seats.

Q. And how large is the Viking Theatre?

A. Just over a thousand, 1017.

Q. So that those two theatres, the Midtown and the Viking, are the two closest theatres in terms of seating capacity at any of the 12 theatres we are talking about, right?

A. Yes.

Q. Now, the Midtown was playing Columbia's picture STORM OVER NILE in June, 1956, which had a national rental of $2?7,000, and this picture was playing also during the same time that you were playing MAN IN THE GRAY FLANNEL SUIT for $3,601,000, right?

A. Yes.

(1579)

Q. Thank you.

And the Goldman Theatre was playing MIAMI EXPOSE, another Columbia picture, on September 12, to 19, 1956, as your book will show, which had a national film rental of $291,000, during the same period that you told Mr. Sawyer you were playing a weak picture, BIGGER THAN LIFE, a Fox picture.

A. When was this, September 12?

Q. September 12 to 19. So your opposition, Mr. Goldman, whom you are suing here, was playing a picture of $291,000 national film rental and the picture you complained about was $491,000, wasn't it, national film rental? That's right, isn't it? Don't shake your head.

A. I would assume, yes.

Q. And the same week your Stanley Warner opposition that you are suing here was playing VAGABOND KING which had a national film rental, which is a Paramount picture and had a national film rental of $410,000 as against your $491,000. Still less than yours. The same week that you were complaining about this picture, right?

A. Yes.

Q. But the same week, September 11, 1956, another opposition theatre of yours that you are not suing, that is not associated with Goldman, that is not associated with Stanley Warner

(1580)

namely, the Arcadia Theatre, they were playing HIGH SOCIETY with Bing Crosby and Grace Kelly and Frank Sinatra, a $5,668,000 picture, right?

A. My bid indicates that I was willing to play that picture too.

Q. And my question to you—

Mr. Nizer: I move to strike it out as not responsive.

The Witness: Yes.

By Mr. Nizer:

Q. The answer is yes, isn't it?

A. Yes.

Q. So while you are playing and all your opposition are playing pictures of $490,000, another opposition, not associated with any of the defendant theatres, is playing almost a $6,000,000 picture, right?

A. Yes.

Q. And the same week another theatre opposition, the Trans-Lux, that doesn't belong to either Stanley Warner, does it—

A. No, sir.

Q. —or to Goldman?

A. No, sir.

Q. That is operated by a man called Brandt?

A. Yes, sir.

Q. An individual?

A. Yes, sir.

(1581)

Q. They were playing the same week TRAPEZE with Burt Lancaster, Tony Curtis, which is also a $7,000,000 picture — six million nine, correct? They were playing it?

A. Yes, sir.

Q. Now, the next Columbia picture that turned out to be weak, I hate to say this about my client in this case but let's say a lemon, again, to be colloquial—

A. You are very truthful.

Q. —and which you ignored, played also at the Goldman, didn't it? That is BRING A SMILE ALONG, with Frankie Lane and Keith Purcell. Did you ever hear of Keith Purcell, even you?

A. Yes. Keith Purcell is with Metro. Even me.

• • •

Q. July 14, 1955, the Goldman's Goldman Theatre was playing that picture which had a $378,000 national film rental. During the time that he was playing a $378,000 picture you at the Viking were playing the $6,000,000 picture NOT AS A STRANGER, weren't you, at the same time?

A. What were the play dates?

(1582)

Q. July 14, 1955.

A. Yes, sir.

Q. Right?

A. Yes, sir.

Q. And the Goldman Theatre was playing another Columbia picture with the title NIGHT HOLDS TERROR, starring Jack Kelly and Hildie Parks. Did you ever hear of them?

A. Is that the Jack Kelly of TV fame?

Q. No, I don't think so. Anyhow, it only had a $450,000 picture and you were still playing a $6,000,000 picture, right?

A. Yes, sir.

Q. Against Goldman. And the Goldman's Theatre was also playing the Columbia picture CELL BLOCK 2455, with William Campbell and Marian Karr. Did you ever hear of those stars?

A. No, but I have heard of the picture. I think he did very well with it.

Q. Good. And that picture had a $510,000 national film rental, right?

A. Yes. If you say so, I agree.

Q. And he still did well with it, you say?

A. I think he did very well with that.

Q. You follow that, don't you? You gentlemen, you see just how well he does with a picture, your opposition?

(1583)

A. I try to, yes, sir.

Q. And during that week that he was playing, on June 8, 1955, this $510,000 picture, Mr. Goldman's Theatre, you were playing PRODIGAL, an MGM picture, with Lana Turner and Edmund Purdom, which is over a $2,000,000 production, national film rental, as it later turned out, right?

A. Yes, sir.

(1584)

Q. And I will limit myself to only one or two more. The Goldman Theatre on March 6, 1956, was playing HOT BLOOD, $713,000 national film rental, and during this very week you were playing NEVER SAY GOODBYE with Rock Hudson, the $1,300,000 picture, weren't you?

A. I assume from the play date you give, yes.

Q. March 6, 1956.

A. Yes.

Q. And, incidentally, Rock Hudson and George Sanders are outstanding stars; that is the picture you were playing.

A. Rock Hudson is an outstanding star, yes, sir.

Q. You told us before, Mr. Wren, that sometimes the reason you didn't bid for outstanding pictures was because you already had a booking here. I would like to give you these dates and see if you still stick to that in this instance. You bid for MAN IN THE GRAY FLANNEL SUIT on April 3, 1956. Will you accept that specific date?

A. If that is what you have there, yes.

Q. But you didn't have any interest in the EDDY DUCHIN STORY, which was a day before that for bidding, April 2, 1956, did you? That is the one you ignored.

A. Because we thought that FLANNEL SUIT would be a better grosser.

Q. So you chose between two good pictures, didn't you,

(1585)

voluntarily?

A. Yes, sir.

Q. Nobody compelled you to bid on GRAY FLANNEL SUIT and nobody told you not to bid on the EDDIE DUCHIN STORY, that is a matter of your judgment, right?

A. Yes, sir.

Q. And if you make a mistake in judgment you don't expect subsequently that either your competitors or the motion picture companies will give you back the money that you lost due to your bad exercise of judgment, do you? You don't claim that?

A. No, sir.

Q. And in the case of THE MAN IN THE GRAY FLANNEL SUIT you did exercise bad judgment as it turned out, you bid too much for it, didn't you?

A. Yes, sir.

Q. Now let us turn to Loew's and the picture GUYS AND DOLLS. You say that you submitted an offer for GUYS AND DOLLS, that is, the Samuel Goldwyn production, right?

A. Yes, sir.

Q. Was this offer ever rejected?

A. Never.

Q. After your offer was made did you ever have any further communication with Loew's respecting this picture?

(1586)

A. Well, we had many discussions after the offer was submitted, many as to why we didn't get it.

Q. Did you have any communication with Loew's before the picture played any other place?

A. I don't remember, sir. We had a lot of discussions about this picture.

Q. You say you had a lot of discussions?

A. Yes, sir.

Q. In 1957 you gave testimony in deposition on that subject, do you recall that?

A. Yes, sir.

* * *

Q. Last Tuesday, when you were testifying and Mr. Sawyer was asking you questions you did not testify that you had many communications with Loew's about GUYS AND DOLLS, did you?

A. I didn't say "communications," I said "discussions".

Q. You draw a distinction between discussions and communications?

A. Yes, when I speak of communications I assume that you mean letters or correspondence of some type or description,

(1587)

and discussions would be phone conversations.

Q. Phone conversations?

A. Yes.

Q. It would be a communication, wouldn't it?

A. Well, if you want to analyze it, yes.

Q. And that would be a discussion, wouldn't it?

A. That is what I am putting it, in that category, discussion, yes, sir.

Q. Well, now, you said you had lots of discussions, you mean also by telephone?

A. Oh, yes.

Q. You would consider a discussion by telephone a communication, wouldn't you?

A. If you wish, yes.

Q. Well, didn't you testify as follows on page 898:
Did you ever have any further communications with Loew's respecting this picture?
Answer: No, sir.
Did you make that answer last Tuesday?
A. Yes, sir, I did.
Q. Now, you tell us that—

Mr. Sawyer: Read the next question, Mr. Nizer, in all fairness now.

Mr. Nizer: It has nothing to do with it, but
(1588)

I will read it.

By Mr. Nizer:

Q. What was the next thing you knew?
A. That the picture was playing the Randolph Theatre.
A. That is right.

• • •

Q. As Mr. Sawyer asked me to read it, the next question and answer were:
(1589)

The next thing you knew after you submitted an offer on GUYS AND DOLLS the picture was playing at the Randolph Theatre.
That is the next thing you knew about it?
A. No, was to play the Randolph Theatre.
Q. Or was to play the Randolph Theatre.
Was to play?
What was the next thing you knew? was Mr. Sawyer's question. That the picture was playing the Randolph Theatre. Not was to play. The next thing you knew was when you saw it there on the marquee.
A. The picture didn't open until November.
Q. And that is the next time you knew about it?

A. No.

Q. According to your—

A. I knew about before it went up on the marquee of the Randolph.

Q. Then this was a wrong answer?

A. Yes, sir.

Q. The question and answer that Mr. Sawyer asked me to read to you turns out to be an incorrect answer on your part, right?

A. Yes, I knew where the picture was going

Q. And this is incorrect, what you testified to?

A. If that is the way it reads, yes.

(1590)

Q. Well, of course, don't say if that is the way it reads, read it.

A. Well, I haven't read it, sir.

Q. It isn't "if". It does read that way, doesn't it?

A. "Playing the Randolph Theatre," yes, sir.

Q. And that was wrong?

A. Yes, for that particular time.

Q. Now, the fact is that long before it played at the Randolph Theatre you had conversations with Loew's representatives about that picture, didn't you?

A. I had conversations with Mr. Lipps and Mr. Formato prior to the bid being put in and with Mr. Emory Austin prior to the bid being put in.

Q. I am talking about after you made your offer, Mr. Wren. You said that after you made your offer the next thing you knew the picture was playing at the Randolph Theatre, and my question to you is, isn't it a fact that you had conversations with Loew's representatives about that picture long before the picture played at the Randolph Theatre?

A. I don't recall that, sir. We may have.

Q. Well, the picture played at the Randolph Theatre, you just told us, in November.

A. In November, right, sir.

Q. Did you meet with Mr. Formato in September?

(1591)

A. That is what I was trying to locate. I think we had a meeting with Mr. Formato and Mr. Ripps.

Q. And Mr. Formato is who?

A. Mr. Formato at that time was either the branch or district manager for Loew's in this particular area.

Q. So you were meeting with Mr. Formato a month or two before November 11, and Mr. Formato was an executive of Loew's, right?

A. Right, sir.

Q. Did you discuss your offer for GUYS AND DOLLS with him?

A. I believe we did.

Q. Did you ask him what was happening to your offer at that time, or didn't you just tell him?

A. I believe that is when we were told they had nothing to do with the picture.

Q. They had what?

A. Nothing to do with the picture. It was a Samuel Goldwyn production. They had no control over it.

Q. Now, let us clarify that. What you mean is that when Samuel Goldwyn makes a picture, and he distributes through Loew's, that he, Samuel Goldwyn, designates his own sales representative who approves or rejects bids rather than Loew's, is that right?

A. That is what we were told at that time, but that isn't

(1592)

what we were told when they were soliciting offers. The offers originally were solicited by Mr. Formato of Loew's and Mr. Rippes of Loew's.

Q. No doubt the Loew's organization uses a sales force to submit offers and to deal, negotiate for the pictures. My question is, don't you know that Samuel Goldwyn's representative, in this case Mr. Robert Mochrie, had to approve or reject any proposal that the Loew's salesman brought back, because he was representing Mr. Goldwyn, Samuel Goldwyn, who keeps a control over his property? You know that, don't you, as a motion picture man?

A. We have been told that since then, yes, sir.

(1593)

Q. You mean you didn't know it then?

A. No, sir, we did not. There was never any discussion about Mr. Mochrie or Mr. Samuel Goldwyn. This was a Loew's release and they were soliciting offers.

Q. Hasn't Mr. Goldwyn followed that practice for many years that you have been in this business on all the other Goldwyn pictures? Hasn't he got a representative that has to approve or reject? Don't you know that, as man to man now, frankly, don't you know that?

A. Frankly, I have heard that Mr. Goldwyn—

Q. Yes.

A. —is a pretty tough man to do business with.

Q. Yes. And by that you mean that he insists on having his own representative who either approves or rejects whatever the company gives him, Loew's or RKO—at one time they were distributing for him, right?

A. I have heard of a Mr. Mulvey, too.

Q. That's right. So now we do agree, don't we, that at least you have general knowledge in the industry that Mr. Samuel Goldwyn appoints his own representative who has to pass final approval of any

contract of any size sale, right? That is your general knowledge, isn't it?

A. Yes, I would assume so.

Q. And you also know that is true of United Artists,

(1594)

A. No, sir.

don't you?

Q. Well, when Stanley Kramer makes a picture and United Artists distributes it, don't you know that you have to have the approval of Stanley Kramer's representative, Mr. George Schaeffer, right across the contract, typed right on it, a big stamp?

A. Says that he has to approve the contract?

Q. Yes.

A. I would like to see that contract.

Q. I will show it to you.

Mr. Nizer: Give me NOT AS A STRANGER.

By Mr. Nizer:

Q. Do you want to see it? Look at this NOT AS A STRANGER, your contract. Do you see "Approved, George Schaeffer" right across it?

A. You said across the top, "Stanley Kramer Approves."

Q. I didn't say that at all.

A. May I hear the question, please?

Q. I was talking about Mr. George Schaeffer, and Mr. George Schaeffer is Stanley Kramer's representative. He is the producer like Samuel Goldwyn.

A. I don't recall your discussing Mr. Schaeffer at all, sir. You told me Mr. Stanley Kramer.

(1595)

Mr. Nizer: Will you read it back?

The Witness: Please.

(The questions and answers were read by the reporter as follows:

"Q. And you also know that is true of United Artists, don't you?

"A. No, sir.

"Q. Well, when Stanley Kramer makes a picture and United Artists distributes it, don't you know that you have to have the approval of Stanley Kramer's representative, Mr. George Schaeffer, right across the contract, typed right on it, a big stamp?")

Mr. Nizer: That is all, you can stop there.

The Witness: Right.

By Mr. Nizer:

Q. So you were wrong about that?

A. Yes, sir.

Q. And it is correct, isn't it, that right on your own contract of United Artists it has to say "Approved, George Schaeffer," the representative of Stanley Kramer?

A. Yes, sir.

Q. Now, the fact is, then, that this is true of all United Artists—well, I will withdraw "all." I am not sure on the very small pictures. But of most of the large productions

(1596)

of United Artists, United Artists is not a producing company, it merely distributes the productions of other organizations, of producing units, is that right?

A. Yes, sir.

Q. And each producing unit has its representative who guards that fellow's property as against all the other production units, right?

A. Yes, sir.

Q. And you know that when you deal with United Artists you can't merely get the approval of the United Artists Company, you have got to get the approval of the man who made the picture through his representative, right?

A. There is no indication—from what you say evidently yes, but there is no indication on these solicitation letters that this has to be—

Q. I didn't say solicitation letters. They wouldn't make a speech of that kind. I say when the contract is finished—and you have been in this industry—

A. When it is finished, yes, sir.

Q. —you know that it requires the approval of the United Artists representative.

As a matter of fact, you say the solicitation doesn't say so. Actually I read to you at the very bottom of this contract and right above your signature I find this

(1597)

printed clause:

In witness whereof the exhibitor has on such and such a date—which is typed in—executed this competitive bid application, which upon approval by the producer—

See, not by United Artists, which is distributing, but by the producer, and acceptance by the distributor —that is United Artists—will become a contract. So there is a regular printed clause on that, too, isn't there?

A. Yes, but you are also coming back now to an approval by United Artists.

* * *

Q. The pictures which United Artists distributes are made

(1598)

by different producers. There is the Burt Lancaster Company that makes one, there is the Frank Sinatra Company that makes one,—

A. Yes, sir.

Q. —there is a Marilyn Monroe Company that made one recently, THE MISFITS, and so on. Isn't that so?

A. Yes, sir.

Q. So it is never the same producer's representative who accepts or rejects, it is always a different person who exercises his judgment with respect to your bid,—

A. Not always.

Q. —depending upon what picture?

A. That's right, depending upon what distributor's representative.

Q. You mean producer's representative.

A. I mean producer's representative, that's right.

• • •

(1599)

Q. Coming back for one moment to HIGH SOCIETY, the Bing Crosby picture, you volunteered the comment when I asked you about it that you would have liked to have had that picture. Do you recall that comment?

A. Yes, sir.

Q. Now, that picture ultimately was won by the Arcadia Theatre, was it not?

A. Yes, sir.

Q. And the Arcadia Theatre is operated by the Shapiro brothers?

A. Yes, sir.

Q. And has no association with Stanley Warner or Goldman?

A. No, sir.

Q. So that the picture that you referred to that you would have liked to have had was won by some other theatre, competing theatre, having nothing to do with these defendants, right?

A. Right, sir.

Q. Now we are back to GUYS AND DOLLS and your statement that after you submitted an offer, the next thing you knew the picture was playing at the Randolph Theatre and that you

(1600)

had had no communications, and we were up to the point where I asked you whether you were meeting with Mr. Formato, the representative of the Loew Company which was distributing GUYS AND DOLLS for Samuel Goldwyn. We are up to that point.

Now will you answer that question. Were you meeting with Mr. Formato of Loew's prior to the time that the picture began to play at the Randolph Theater?

A. Yes.

Q. And therefore you did have communication with Loew's on this subject before you saw the picture on the screen or on the marquee of the Randolph, didn't you?

A. Right.

Q. Did you testify in an examination in the suit of Universal Film Pictures against the Viking Theatre?

A. Yes, sir.

Q. At page 200 you were asked about GUYS AND DOLLS:

Your specific complaint about the picture was that they have not advised—

And you said:

I am still waiting to find out who got the picture.

And that was in 1957.

A. By that I mean an official rejection notice comparable to the type that they send out.

(1601)

Q. When you made the answer "I am still waiting to find out who got the picture," you didn't mean that you are still waiting to find out who got the picture by a certain type of information, a certain type of communication; you mean you had no knowledge, isn't that what you meant when you answered that?

A. No, sir. I meant exactly what I just said now, that we have yet to receive official rejection on the picture from Loew's Incorporated.

Q. Well, is it your understanding that that is a grievance, if the bids are submitted by eight people and one wins it, is it a grievance if they don't send you a formal letter saying it is rejected, but they meet you and tell you? Is that a grievance?

A. Well, it is customary. That is what they do, yes, s[illegible]

Q. And didn't you meet with Mr. Formato on the very day that this picture was awarded to the Goldman's theatre?

A. I don't recall. I don't remember when it was awarded to the Goldman Theatre, sir—to Mr. Goldman's theatre, rather.

Q. Were you meeting with Mr. Formato at various times—let me supply the date. It was awarded on September 15, 1955. Now, were you meeting, my question is, with Mr. Formato on September 15, 1955?

(1602)

A. I don't recall, sir.

Q. Let me see if I can help you.

You make out expense vouchers, don't you, which you submit to the Locust—to the Viking Theatre for payment?

A. Yes, sir.

Q. And on these vouchers are listed every taxicab fare that you have, where you go?

A. Yes, sir.

Q. And if you have lunch or dinner, if you happen to pay for it you put that down, don't you?

A. Yes, sir.

Q. It is an expense voucher?

A. Right, sir.

Q. Incidentally, you also book and buy for Mr. Sley's other theatre, the Locust Theatre, don't you?

A. That's right, sir.

Q. And if you had any expenses for booking or buying or traveling for the Locust Theatre, do you charge it to the Viking Theatre just the same?

A. Yes, sir, it all goes on one report.

Q. But it is charged to the Viking Theatre?

A. Yes, sir.

Q. And your whole salary is charged to the Viking Theatre?

(1603)

It isn't split between the Locust that you take care of for him and the Viking, is it?

A. No, sir.

Q. And that charge of your salary and all the expenses go into that $4,905.17 or nineteen cents—I think it is always nineteen cents—that you charged the film companies for your overhead for the week. Do you remember that figure you always read off, 90-10 over $4,900.19? All those charges are in that, aren't they?

A. I didn't read off that same figure all the time, sir. On a Loew's product it is $4,900.

Q. Let's not quibble on that. $4900.19, whatever it is.

These charges when you do work for the Locust Theatre for Mr. Sley go into the Viking?

A. Yes, sir.

Q. And when a picture plays at the Viking the motion picture company has a deduction made for all

of your salary and all of those expenses, hasn't it, into that figure of overhead?

A. Yes, sir.

Q. And you know that isn't correct, don't you? That isn't a right way to do it; it should be split between the Locust, another theatre, and the Viking, shouldn't it?

A. Well, Mr. Sley keeps the books. I do not keep the

(1604)

books. But that is the way he elects to do it.

Q. You don't approve of it?

A. That is his method.

Q. That is his business?

A. He is my employer, yes, sir.

Q. You don't think that is right, though, do you, yourself?

A. It is entirely up to Mr. Sley, whatever he elects to do.

Q. You don't think it is right is my question.

A. I do because the expenses at the Locust Theatre are a minimum. The time that I expend booking and buying for the Locust Theatre is practically nil.

Q That used to be your job, wasn't it, the Locust and the Tower? Didn't you once do that as your old job?

A. No, sir, I did not.

Q. No?

A. No, sir.

Q. And now you tell us that booking and buying for the Locust Theatre is minimum but booking and buying for the Viking Theatre, that is the whole thing, is it?

A. That takes—

Q. That is your standard of proper apportionment of expenses?

A. Yes, sir. It takes practically all of my time.

(1605)

Q. And when you submit this expense to the distributor you figure it right up to the penny, you don't take off an-

other couple of hundred dollars or something for other expense, do you?

A. Well, it wouldn't be a couple hundred dollars, sir.

Q. Well, this expense voucher, I show you the expense voucher which you submitted on the 17th of September 1955. We were talking about whether you met with Mr. Formato of Loew's—

A. Right, sir.

Q. —on the very day that the picture was awarded, and I ask you to look at this document and ask you if that refreshes your recollection that you met with Mr. Formato of Loew's.

A. I can't read that, sir. Do you have the original?

Q. The original is in your file, so will you please produce it?

I would like to have a better copy, too.

A. "Lunch, Moore's in New York City, L. Formato, N. Fellman."

Q. So that shows that you went to New York City to meet with Mr. Formato at Dinty Moore's. That is the restaurant, right?

A. Yes, sir.

(1606)

Q. And that was on what date?

A. This is the week ending 9/17/55.

Q. What is the date that you met with him?

A. It looks like 9/15. I can't make it out.

Q. That is the very date on which GUYS AND DOLLS was awarded to the Randolph, right?

Mr. Sawyer: How do you know when it was awarded?

A. I don't know when it was awarded.

By Mr. Nizer:

Q. I stated the dates subject to your checking. It is in the record.

A. All right, then it is the date.

Mr. Sawyer: Is that the license agreement date? I would like to find out.

Mr. Nizer: I will give it to you later, the precise document, sir. Let me proceed.

By Mr. Nizer:

Q. Now, did you meet with Mr. Formato of Loew's that evening as well as that lunch hour?

A. Yes, sir.

Q. So you had both lunch and dinner on that day?

A. Right, sir.

Q. And you still tell us that you didn't discuss the

(1607)

matter of whether the GUYS AND DOLLS was rejected, you bid?

A. This is the—

Q. Do you still tell us that? Please answer that question.

A. To the best of my knowledge, yes, because this meeting—I see Jay Eisenberg here—was with reference to advertising.

Q. No, no, I am not asking you about advertising.

Mr. Sawyer: Oh, yes. Just let him finish. Just let him finish, please.

A. This was with respect to advertising matters.

By Mr. Nizer:

Q. As I understand it, you tell me that even though you were meeting with Mr. Formato of Loew's for lunch and dinner,—

A. Yes, sir.

Q. —and you had your offer outstanding for GUYS AND DOLLS, which was a very important picture, wasn't it?

A. Yes, sir.

Q. You were very eager to get it, weren't you?

A. Yes, sir.

Q. You had put in a bid for it?

A. Yes, sir.

Q. And you tell me that both at lunch and dinner you never asked him, no matter what else you were discussing, you never asked him, "How am I doing on GUYS AND DOLLS?" Or "Has there been a decision made?" You never said that in

(1608)

substance or effect?

A. I don't believe we did, sir.

Mr. Sawyer: Could I have the license agreement, please, Mr. Nizer?

Mr. Nizer: We will get it.

Will you get the license agreement, please?

By Mr. Nizer:

Q. And you still tell us that even though you were meeting with him both—did you meet with him before that date at New York?

A. I would assume we did, yes.

Q. And you still tell us that even though you were meeting with him, the first thing you knew about the Randolph Theatre having gotten that picture was when you saw it on the marquee and marked it in your book?

A. No, I didn't mean that at all, sir. I said we have no official communication to this day from Loew's telling us that our offer for GUYS AND DOLLS has been rejected.

Q. And when you testified "I am still waiting to find out who got the picture," that is what you meant?

A. Yes, sir.

Q. Did you know who got the picture even though you didn't get a letter from Loew's, according to you?

A. Oh, certainly. It is common knowledge, sir. Any time

(1609)

a picture of that caliber is awarded everybody in town knows it.

Q. So when you testified — and I am quoting your words in the Universal deposition, the Universal case— "I am still waiting to find out who got the picture," that was wrong, wasn't it?

A. I am still waiting an official communication as to who got the picture, yes.

Q. That is not what you said.

A. No, it is not, no, sir.

Q. And what you said is wrong, isn't it?

A. Yes, sir.

Q. And after you came with Mr. Sley at the Viking Theatre Loew's awarded you the following pictures right in a row. Check me on this. February 1955, HIT THE DECK.

A. Right.

Q. With Jane Powell, Tony Martin, Debbie Reynolds, right?

A. Yes, sir.

Q. An outstanding picture?

A. A good picture.

Q. The very next month, March 1955, Loew's awarded you GLASS SLIPPER with Leslie Caron and Michael Wilding, right?

A. Right, sir.

Q. That picture opened up at Radio City Music Hall, didn't

(1610)

it?

A. I believe it did.

Q. That is a very good picture?

A. That is a good picture.

Q. And you got that?

A. Yes.

Q. Two in a row.

In April 1955, Loew's awarded you PRODIGAL, with Lana Turner. That was a good picture, wasn't it?

A. Well, not what we expected. It was a good picture, yes.

Q. Now, the next picture you didn't get, but did Goldman or Stanley Warner get it, "IT'S ALWAYS FAIR WEATHER?

A. I believe it played the Arcadia.

Q. So a competing theatre having nothing to do with any of the defendants in this case got that one against you and against Stanley Warner or Goldman or anyone else, right?

A. Yes, sir.

Q. And the next Loew's picture was GUYS AND DOLLS, which was awarded to the Randolph. We just had that.

A. I played another Loew's picture. WIZARD OF OZ, a reissue.

Q. I am going to come to it, I assure you. I will skip nothing, so please answer my questions.

(1611)

The next Loew's picture—I am taking them in a sequence—was THE TRIAL with Glenn Ford, Dorothy Maguire and Arthur Kennedy. Now, that wasn't awarded to you, was it?

A. No, sir.

Q. And that wasn't awarded to Stanley Warner, was it?

A. No, sir.

Q. And it wasn't awarded to Goldman?

A. No, sir.

Q. It was awarded again to the Arcadia, operated by two people called the Shapiro brothers?

A. Right, sir.

Q. Now, thereafter from—withdrawn.

There is no doubt that in 1955 Metro or Loew's, calling them either way, was one of the top major producing companies in the industry?

A. I would say so, certainly.

Q. Now, for a period of almost a year, from August 26, 1955, to be specific, to July 17, 1956, just short of a year or so, you did not submit a single offer to Metro or try to negotiate with Metro for a single picture, did you, during that period? Just tell me first whether you did or not.

A. No, with an explanation.

(1612)

Q. And the explanation that you would like to make is that you had a dispute about advertising with them. Is that right?

A. The explanation——

Q. Just answer my question. Is that correct? You had a dispute about advertising.

A. Yes, with an explanation.

Q. I will get into advertising some other time. I just want to hold this sequence of this.

Mr. Sawyer: The witness is entitled to explain, Your Honor, at the time the question is asked.

The Witness: May I say that we had any number of letters to Metro asking them that on the particular pictures which they were announcing the release of we would be afforded, given the information as to their plans advertising-wise. I think you will find a number of letters. They would never reply to our correspondence with reference to advertising.

By Mr. Nizer:

Q. That was the dispute prior to the dates I have given you?

A. Yes, sir.

Q. Now, I am going to ask you when that dispute arose and we are going to go into it separately, when that dispute arose. Did you voluntarily thereafter, because of that pending dispute, stay away from Metro and Loew's for almost a year without attempting to either bid or negotiate for a single picture of

(1613)

Metro's?

A. We attempted to, through the mail, sir, and they wouldn't tell us what their advertising plans were for the picture being offered.

Q. Now, that isn't the fact, is it? Didn't you testify—page 686—

Q. Were you interested in any Metro pictures that were released in that six months' period?

A. If they would clarify the advertising plans, we were interested in submitting offers. We told them until such time as they would and until such time as they cleared up the past advertising deals we had and paid us the money that was due us, that from that time forward and until such time as they told us exactly what constituted adverising, we were not interested in submitting offers on their pictures because you were constantly making two deals.

Did you make that answer?

A. That is right, sir.

Q. So that we are agreed, are we not, that until they yielded to your proposition on advertising, which we will discuss some other time, that you decided that until they agreed with you about that dispute you were not interested in a single Loew's picture? You wouldn't bid or negotiate

(1614)

for it?

A. I did not say that, sir. What I think I said was until such time as they advised us as to their advertising plans on the pictures being offered we were not interested in submitting offers.

Q. All right. I will accept that. Until they told you their advertising plans, according to your theory of advertising, you were not going to be interested in any Loew's pictures. I am stating your proposition.

A. It isn't a question of our theory. At no time would they tell us what constituted advertising.

Q. Did they owe you a duty to tell you what constituted advertising? Does any company owe you that duty?

A. The other companies—

Q. I did not ask you whether others do. As a matter of good will between exhibitor and distributor lots of things happen. I am asking you candidly, does the company owe you an explanation of what advertising they will give or make? Is that your theory?

A. Yes.

Q. All right. Now, because of that theory you were not interested in any of Loew's pictures for almost a year because they would not do that; is that right?

A. That is right, sir.

(1615)

Q. Q. And for at least ten months prior thereto you had failed to submit a bid or negotiate for a single METRO picture. Is that correct?

A. That is is right.

Did you make that answer?

A. Yes, sir.

Q. Now, during this period that you did not have any interest in Loew's pictures for the reason you have given, Loew's released I'LL CRY TOMORROW with Susan Hayward?

A. Right.

Q. She, I think, won the Academy Award?

A. That is right, sir.

Q. That turned out to be a $5,900,000 picture.

A. Right, sir.

Q. That picture, incidentally, was awarded to whom? Do you know?

A. I believe it played the Arcadia Theatre.

Q. You are quite right. The Goldman did not get it, the Stanley Warner did not get it, the Shapiro Brothers got it, operating a competing theaters.

A. Right.

Q. During that period you were not bidding or negotiating for Loew's pictures. They made THE TENDER TRAP with Frank Sinatra, Debbie Reynolds, David Wayne. That was a $3 million

(1616)

picture as it turned out.

A. Yes, sir.

Q. Incidentally, you testified when Mr. Sawyer was questioning you, that during that time when that picture was playing, November 15, 1955—

A. The Stanley Theatre, that is right, sir.

Q. —that you testified you complained because you did not get DESPERATE HOURS which had a $1,500,000 gross national film rental, rather.

A. Yes, sir.

Q. But you ignored TENDER TRAP for the reason you have given, that it had a $3 million national film rental as it turned out; is that right?

A. Yes.

Q. And during that period that you were not negotiating or bidding for pictures, Loew's distributed THE SWAN, with Grace Kelly, Alec Guinness and Louis Jourdan.

A. That is right, sir.

Q. Incidentally, a picture with Grace Kelly is of particular value in Philadelphia, isn't it?

A. With one exception.

Q. What is that?

A. With one exception.

Q. Well—

(1617)

A. GREEN FIRE.

Q. I see. But generally speaking, that is a special attraction because of natural pride and knowledge of her here?

A. Right, sir.

Q. You did not have any interest in that picture, did you?

A. No, sir.

Q. FOREVER DARLING during that period was made by Loew's. You did not bid for that. That was a $1,900,000 picture. Do you recall that?

A. Esther Williams?

Q. What is that?

A. Was that an Esther Williams picture, with Howard Keel?

Q. I don't happen to have it here. I cannot say.

A. I believe it is. No, sir.

Q. To be briefer about it, I will run through them: MEET ME IN LAS VEGAS with Syd Charisse. That was a $2,200,000 picture. You did not attempt to bid or negotiate for that?

A. No, sir.

Q. And BOHWANI JUNCTION with Ava Gardner and Stewart Granger, you did not attempt to bid or negotiate for that?

A. No, sir.

Q. Where did that picture play? At the Arcadia?

A. Well, Bohwani Junction played either at the Arcadia or the Trans-Lux.

(1618)

Q. Neither of which is associated with Stanley Warner or Goldman.

A. No, sir.

Q. Now, Mr. Wren, staying away from a top producing company like Loew's for a year, as you did, almost a year, didn't bother you at all, did it?

A. Not until such time as the advertising was clarified; no, sir.

Q. That wasn't my question.

A. No, sir.

Q. Staying away from a company like Loew's for almost a year and not even having an interest in these outstanding pictures, that did not bother you in the operation of your theater, did it?

A. Mr. Nizer, that is only partly right. I think if you check, you have my expenses there, that we even paid for the screening of THE LAS VEGAS STORY. I think I testified to that.

Q. Let me read to you—page 696. You were asked the following question in a deposition:

Q. And for at least ten months prior thereto you had failed to submit a bid or negotiate for a single Metro picture; correct?

A. Right.

A. That is right.

(1619)

Q. Q. you were standing on your dispute with Metro on advertising?

A. Right, sir.

Is that right, sir?

A. Right.

Q. Q. Correct?

A. Right.

On page 697:

Q. You found that staying away from one of the top major producers for ten months was getting a little costly, didn't you?

A. No, sir.

Q. It didn't bother you at all?

A. No, sir.

Did you make those answers?

A. Yes, sir.

Q. Were they correct when you made them?

A. Yes, sir.

Q. Is United Artists also a top producing company in the motion picture industry?

A. Yes, sir.

Q. During the period that you were associated with the Viking Theatre there were over forty pictures which United Artists made available for first run for exhibition in

(1620)

Philadelphia. Will you accept that calculation from the release schedule which you have so that you don't have to stop and add them up?

A. Yes, sir.

Q. Will you accept that?

A. Yes, sir.

Q. Out of those forty United Artists pictures the Viking Theatre only bid or negotiated for fourteen out of the forty. Is that right?

A. Is that including STRANGER?

Q. Yes. And of the fourteen that you showed an interest in how many did you get?

A. I don't actually know, sir.

Q. Let us read them off. NOT AS A STRANGER.

A. Right.

Q. BIG KNIFE.

A. Yes, sir.

Q. DESERT SANDS.

A. Yes, sir.

Q. ATTACK.

A. Yes, sir.

Q. COMANCHE.

A. Yes, sir.

Q. REBEL IN TOWN.

(1621)

A. Yes, sir.

Q. KISS BEFORE DYING.

A. Yes, sir.

Q. RUN FOR THE SUN.

A. Yes, sir.

Q. BANDIDO.

A. Yes, sir.

Q. And a double feature HIGH NOON and THE MOON IS BLUE.

A. Yes, sir.

Q. So you got eleven out of the fourteen United Artists pictures that you went for; is that right?

A. Yes, sir.

Q. And of the few pictures the three that you did not get, THE MAN WITH THE GOLDEN ARM, you have asserted no grievance about. You agree you should not have got it, is that right?

A. I think I should have. My bid was rejected and they rebid the picture.

Q. You have not asserted any grievance in this court on that matter?

A. No, sir.

Q. When you say you should have, that is a sort of a present reflection while you are on the witness stand. I am talking about this lawsuit. You haven't asserted any grievance on that picture?

(1622)

A. No, sir.

Q. TRAPEZE. That went not to Stanley Warner or Goldman, that went to the Trans-Lux, another competing theater having nothing to do with any of the defendants; is that correct?

A. That is right, sir.

Q. And you have no grievance about the Trans-Lux getting that. They outbid you, is that right?

A. That's right. But I believe we did object to the manner in which TRAPEZE was handled.

Q. I will come to that. I will not disappoint you.

Now, of the eleven out of the fourteen United Artists pictures that you succeeded in getting, how many of those did you bid for and how many did you negotiate for? Do you want me to supply the figure?

A. I would like you to.

Q. They are right on the contract. Three you won by bidding and eight by negotiation. Will you accept that? It is right on the contract.

A. That is right, sir.

Q. Now, let's sum that up a bit. The Viking got eleven out of the fourteen it was interested in, Goldman's Randolph got two: SUMMERTIME and AMBASSADOR'S DAUGHTER. Is that right?

A. Yes, sir.

Q. And Stanley got one: GENTLEMEN MARRY BRUNETTES.

(1623)

A. Yes, sir.

Q. Those are the fourteen that you were interested in; is that right?

A. That is what you say, yes.

Mr. Nizer: I would like to demonstrate one or two things, Your Honor, on the blackboard. It would be impossible to see the figures by comparison. May I have the blackboard moved here for a moment?

The Court: You may.

By Mr. Nizer:

Q. Counsel asked you to read off the national film rentals of certain pictures that you got. Of course, we

know that the national film rental is the rentals collected for a picture over a period of two years or how long the picture runs. Sometimes three or four years.

A. Right.

Q. In other words, it is hindsight, is that right?

A. Yes.

Q. The national film rental is hindsight as to how good the picture did at the box office.

A. Right.

Q. At the time you submit a bid and somebody else submits a bid nobody knows what these national rentals would be?

A. No, sir.

(1624)

Q. So with that qualification I do not mean to accept these as a correct standard, but since you testified to them I would like you to compare some of these rentals.

Of United Artists you got: NOT AS A STRANGER which had—we will use round figures—$6 million national film rental. National film rental, $6 million. Is that right?

A. Yes, sir.

Q. That is what you got. That is the Viking.

A. Yes, sir.

Q. And the Randolph got SUMMERTIME which roughly is $1 million—$1,139,000—I will say $1 million, take round figures. That is Goldman's Randolph.

The next picture you got from United Artists is ATTACK. That was a fourteen seventy-eight—I will call it one and a half million roughly, film rental as it turned out later. Is that correct?

A. Yes, sir. That did not follow STRANGER, sir.

Q. I am not giving dates.

A. They are not in order?

Q. No, sir; it is not intended to be. That was the Viking. The Stanley Theatre got GENTLEMEN MARRY BRUNETTES. I am wrong about this—GENTLEMEN

MARRY BRUNETTES—that was $1,164,000, so I will say roughly a million. That is Stanley

(1625)

Warner's Stanley. I am just comparing the pictures you got with the pictures you got by hindsight. You see what I mean?

A. Yes, sir.

Q. You got BANDIDO, which is $1,193,000. I will count that $1 million. Viking.

Goldman's Randolph got AMBASSADOR'S DAUGHTER which is $956,000. I will count it also as a million. There is a difference of a couple of hundred thousand dollars. I will say that is approximately the same. That is Goldman's Randolph.

Now, you told us you had an interest in fourteen of the forty odd United Artists pictures. Do you recall that testimony?

A. Yes.

(1626)

Q. Now, the other pictures that you had no interest in, I would like now to show some of those. I don't think I have to write these out. There was the KENTUCKIAN with Burt Lancaster, and that is a two millions six picture.

A. I think it is because I was tied up with STRANGER, was it not?

Q. September 21, 1955?

A. No.

Q. That is wrong, isn't it?

A. That's right. You just passed it up, didn't you? I had something in there for some reason.

Q. Well, you certainly didn't have a two million—

A. No, I didn't bid on it, if that is what you mean, I did not.

Q. And you didn't have a $2,600,000 picture which you preferred to the KENTUCKIAN which you ignored?

A. No, I did not.

Q. And you had a full opportunity to bid and negotiate for the KENTUCKIAN and you didn't do it?

A. No, sir.

Q. And the very week that this picture was available—it played September 21, incidentally—you were playing at your theatre DESERT SANDS with a film rental of only $481,000.

(1627)

Now, let me put those down. I will say "Viking ignores", just so I don't have to repeat it, "Viking ignores", $2,600,000 picture, which is the KENTUCKIAN, and it is playing, "plays" DESERT SANDS, which is a $500,000, 486, let's say $500,000. Right? You ignore the $2,600,000 and you play the $500,000.

A. Yes, sir.

Q. You ignore INDIAN FIGHTER, which has a $2,- You ignore MAN WITH A GUN, which has a million and 167,000 so I will count that two million. You ignore that, a half, roughly; you ignore MARTY and don't try to bid for it, which has a three million—

A. MARTY, sir, was available at the same time as STRANGER.

Q. So you ignored it?

A. I had to.

Q. And you had no grievance then?

A. No, sir.

Q. And the fact that you compared pictures they had high, MARTY played at an opposition theatre—where did it play?

A. Studio Theatre.

Q. Now, suppose it had played or let's take one that played, a very high picture that played let's say at Goldman's Theatre. You would have no grievance and then compare the very large picture he played with the small picture that you have at

(1628)

some time because you couldn't book that picture, could you? That is what you are telling us.

A. That's right.

Q. And that is inherent in the nature of this business, isn't it?

A. Yes, sir.

Q. You only have one week in which you can play one thing on the screen, right, Mr. Wren?

A. Right, sir.

Q. That is fundamental. And if something is on your screen at that time you, of course, cannot play even something better, can you?

A. That's right.

Q. But there are times when you play something that is weak, let's say, as it turns out later—you didn't think it might be perhaps, nor did we. We always have high hopes in this industry, haven't we?

A. Yes, sir.

Q. But sometimes you play something that turns out to be weak and it turns out that at the same time there was something available to you that you could have bought that turns out to be a million, two million, three million; that happens, too?

A. Hindsight.

(1629)

Q. Hindsight. And you can't blame anyone for that, can you?

A. No, sir.

Q. You ignored JOHNNY CONCHO. Is that the way you pronounce that?

A. CONCHO.

Q. Which is a one and half million picture, correct?

A. Yes, sir.

Q. Let's take a birdseye view of United Artists.

Will the stagehands be good enough to perform.

It is clear that none of the eleven competing theatres to the Viking played United Artists pictures which had as high a national film rental as it turned out as had the Viking, right?

A. Where is TRAPEZE?

Q. TRAPEZE? We've had it. Where did it play, the Goldman?

A. The Trans-Lux.

Q. Yes. I am saying non—

A. You mean of the defendants' theatres?

Q. No. I will even go further. No, no. Allowing that somebody had a very high picture, none of the competing 11 theaters played United Artists pictures which had a high national film rental, you took them all together, as United Artists; is that right—as Viking. Excuse me.

(1630)

A. TRAPEZE was much higher, sir.

Q. Yes. I am talking of the average of all.

A. You mean of what you have on the board, the Viking is the best.

Q. Let's do it this way. Of all of the defendant theatres, because TRAPEZE played at a non-defendant theatre, not Stanley Warner or Goldman—

A. Right, sir.

Q. Now, let's take that first. Of all of the defendant theatres, and referring to United Artists pictures, the Viking as it turned out had a much higher national film rental on its pictures than either Stanley Warner or Goldman. That's right?

A. Yes, sir.

• • •

(1631)

Q. The board was illustrative of the fact, and I am asking you for the fact, of the 11 pictures of the 14 that you played, and of the whole 14, and limiting yourself

first to Stanley Warner and Goldman for this purpose, you had a much higher national film rental as it turned out on your pictures on an average than any of them had or all of them had?

A. Right.

Q. Right?

A. Yes, sir.

Q. Now, Would you know, or wouldn't you know—perhaps this

(1632)

is an unfair question, I am not sure, would you know whether that fact isn't just as true if you took all of your competing theatres and not limiting yourself to the defendant's theatres.

A. What did the Viking's do?

Q. Pardon me?

A. Or is that out of the period of the suit?

Mr. Nizer: That is out of the period of the suit.

The Witness: It would be hard for me to say without checking the records. TRAPEZE was a real big one.

By Mr. Nizer:

Q. Yes. And that played not at Stanley Warner or Goldman?

A. No.

Q. Now, while you were with Mr. Sley during your association and up to the period of this suit, and not limiting myself now to the pictures that you bid on, you understand, or negotiate for, no longer the 14—taking all the 40 or more—

A. Yes, sir.

Q. —the Midtown, which you have told us is the most comparable to the Viking Theatre, right, in its size?

A. Only seating capacity.

Q. Yes. It has no balcony?

A. No, sir.

Q. And there is only a difference of some 27 seats between

(1633)

them?

A. That's right.

Q. Now, the Midtown played on August 30, your opposition book I think would show it, NIGHT OF THE HUNTER which was only $858,000 national film rental, correct?

A. If that is what is on the sheet, yes, sir.

Q. Yes. Well, Mr. Sawyer is checking it.

FOREIGN INTRIGUE which had a $782,000 national film rental. That is pretty low, isn't it?

A. Yes, sir.

Q. These are all at your opposition, Mr. Goldman's Midtown. ROMEO AND JULIET which only had $294,000 national film rental, that played at the Midtown?

A. Yes, sir.

Q. Incidentally, you evaluated this picture as excellent and should be road-showed, did you?

A. What is that?

Q. ROMEO AND JULIET.

A. I enjoyed the picture.

Q. I didn't ask you that.

A. If I evaluated it that way, you must have it there. I enjoyed the picture immensely.

Q. Did you give a rating to this picture which only had

(1634)

$294,000 national film rental as excellent and should be road-shown? Did you give it that rating in your handwriting?

A. I may have.

Q. Not may have. You may have done many other things. Did you?

A. I don't recall.

Q. Have you got that here (addressing other counsel)?

A. I would like to see that, Mr. Nizer.

Q. All right, we will try to get it for you.

What does "road show" mean? It should be road-showed, what does that mean?

A. Well, on a two a day basis or, that is, ten shows a week, Wednesday matinee, Saturday matinee, evening performances.

Q. That is before your time, sir, that notation, so that I can't say it is your handwriting. It is a date before you came.

A. I didn't think it was my handwriting, sir.

Mr. Sawyer: Or that he made such a comment about the motion picture at all.

Mr. Nizer: No. I say it was before his time.

By Mr. Nizer:

Q. But you have made similar whoppers of errors, haven't you,

(1635)

in evaluating pictures?

A. I certainly have.

* * *

(1636)

Q. When you came to Mr. Sley's service, in his employ, under a contract?

A. Yes, sir.

Q. When you came to that service had you looked up the records of the prior experience at the theatre, the pictures that played, all the notations about the pictures?

A. At which theatre?

Q. The Viking. When you came there did you go to the back period before you were there?

(1637)

A. Surely.

Q. I show you this picture which is before you came there but I ask you if you didn't look at this record of these pictures and look particularly at ROMEO AND JULIET.

A. No, I never looked at this book. This was a book that my predecessor had kept.

Q. You never happened to see that sheet?

A. No, sir.

Q. All right.

A. That is in that gray book. I may have seen this. No, I never checked this, I never went by this book.

Q. I don't say whether you went by it. Did you see ROMEO AND JULIET "excellent, should be road-shown," that notation? I don't say that made it, now. It is before your time. When you came there, did you go over your records?

A. I never checked these, this record, honestly, never.

Q. I show you the Opposition book. What is that?

A. That is not mine, sir. That was kept by my predecessor.

Q. That is why I am showing it to you.

A. The sheets that I have are long sheets.

Q. I say, I am showing you the Opposition book. What is it, first? What is it?

A. That is a list that my predecessor kept of the attractions playing first-run of pictures that he played, the neighborhoods.

(1638)

Q. Now, when you came to the Viking Theatre didn't you go over the opposition book that showed what others were playing and notations prior to your period? That is the book.

A. No, I would have these, sir.

Q. I say you would go over that, you would look at that for the back period.

A. No, honestly I didn't.

Q. You never did?

A. No, sir, I didn't bother to check it.

Q. You weren't interested in knowing how your opposition was doing and what they were playing at this theatre that you were going to take over booking and buying for? Tell me that. You weren't?

A. No, not from this, sir. I would know that from the availabilities that I had from the other houses that I had the suburban areas. So I would know what played first run.

Q. But you didn't take a look at the opposition book that was available to you at the Viking Theatre?

A. No, sir, not this.

Q. You understand that the sheet I showed you is not an independent sheet, it is a copy of that book.

A. Right, right. I have seen more of this since the trial, sir, since depositions.

Q. Now, also at the Goldman Theatre during the period that

(1639)

you were there you passed up pictures which played at the Goldman, and one of the pictures that played at the Goldman was THE KENTUCKIAN, which is two million six, a very good picture, wasn't it?

A. Yes, sir, I said that.

Q. And MAN WITH A GUN, a million four?

A. If that is what is on the sheet, yes, sir.

Q. Yes, Mr. Sawyer is checking it.

And PURPLE PLAINS, a million one?

A. Yes, sir.

Q. Now, you had no grievance that pictures that you had passed up played at your opposition theatre, no matter whose theatre it is?

A. Right, sir.

Q. Now, on top of that Goldman also played pictures which you ignored, which you had no interest in, because you thought they were very bad quality, isn't that so?

A. Maybe, or maybe because I was booked.

Q. Well, let us see. Tell me whether it was because you were booked or because you didn't care for these pictures--

A. Right, sir.

Q. —and yet the Goldman played them: BIG HOUSE USA, $457,000 national gross.

A. I wasn't interested in the picture, sir.

(1640)

Q. Whether you were booked or not booked, right?

A. That is right, yes, sir.

Q. Even if you had an empty spot you wouldn't play such trash, right?

A. Well, I played some trash, but I wasn't interested in that picture.

Q. You wouldn't want to play this trash, but the Goldman Theatre played it, right?

A. Yes, sir.

Q. A double feature bill: BLACK SHEEP and CREEPING UNKNOWN; $229,000 for the latter, $437,000 national film rental for the first.

You wouldn't have anything to do with that kind of picture, would you?

A. No, sir.

Q. It played at the Goldman, didn't it?

A. If you tell me it did, yes.

Q. Yes, July 11th to 18th.

NAKED STREET, $396,000, and you weren't interested in that whether you were booked or not booked, correct?

A. I don't know who was in the picture. I may have been.

Q. BULLET FOR JOEY, $373,000; would you have any interest in that picture whether you were booked or not?

(1641)

A. No.

Q. That played at your opposition, i. Goldman Theatre that you are suing here, right?

A. If you say so, yes, sir.

Q. Yes. I will give you the dates, July 8th to 14th, and you are charging the companies I represent, the motion picture company with having conspired with Mr. Goldman to get him this stuff, aren't you? That is your charge.

A. I think the charge is a little more than that, sir.

Q. But that is the charge, isn't it, one of the charges? United Artists got together with Mr. Goldman to give him this trash, right? Isn't that so?

A. They gave us—

Q. Isn't that your charge?

A. My charge is they gave Mr. Goldman SUMMERTIME too after I put up money for it.

Q. They gave you NOT AS A STRANGER, which is the highest and the best United Artists ever had.

A. For money.

Q. For money.

A. For a guarantee.

Q. Yes. I have no grievance when you get the award. We hope you bid higher and get more.

A. That is right, sir.

(1642)

Q. THE KILLING, a $333,000 picture. You had no interest in that, did you? That is the national film rental.

A. No, sir.

Q. Even if you had a big hole in your booking record and you needed a picture you wouldn't take that, would you?

A. Well, I took DESERT SANDS.

Q. My question is would you take this.

A. I may have.

Q. DESERT SANDS was how much national film rental, $476,000?

A. Yes.

Q. And this was $333,000, would you go lower than that too?

A. If need be, yes, sir.

Q. But you didn't have any interest to negotiate or bid for this picture, did you?

A. When was it playing?

Q. June 27th to July 3rd, 1956.

A. No.

Q. The fact is, Mr. Wren—see if we can't agree on this basic fact—that the Viking Theatre rarely played this kind of slough product, isn't that so?

A. That is right.

Q. And by slough product we mean pictures that we know in advance, even before waiting for national film rentals, are very weak: no star power, no big productions, lemons; you

(1643)

didn't play that kind of slough product, did you?

A. Well, DESERT SANDS—

Q. Generally.

A. —was slough.

Q. Well, you had some I guess, everybody has.

A. I should say I did.

Q. And when you had it you had it by accident?

A. A KISS BEFORE DYING was slough.

Q. Yes, but you had it, Mr. Wren—will you pay attention to me for a moment, please.

A. Yes, sir.

* * *

The Witness: COMANCHE was slough.

By Mr. Nizer:

Q. Yes?

A. ON THE THRESHOLD OF SPACE was slough.
A REBEL IN TOWN was certainly slough.
TEENAGE REBEL was slough.

(1644)

Not from United Artists, but these are slough pictures.

Q. No, Mr. Wren—

A. Yes, sir.

Q. —first of all, I am talking about United Artists and I will give you a full chance about others.

A. Right, sir.

Q. But when you say these pictures were slough what you mean is you bought them hoping they were going to be very good and they turned out not to be so good, right?

A. No, not TEENAGE REBEL, sir, and not DESERT SANDS, no.

Q. Then you had a few that you played that you knew in advance were lemons, is that what you are telling us?

A. Yes, KISS BEFORE DYING we knew wasn't going to be good.

Q. Was not going to be good.

A. That is right.

Q. But the fact or the general proposition is that the reason you didn't bid or negotiate for all of these pictures that we have been talking about, of the forty odd, a good many of them slough pictures, is because your policy—and I am not criticizing it—was not to play slough pictures generally at the Viking Theatre, right?

A. We want far better quality than that, yes, sir.

Q. And these slough pictures did play at your opposition,

(1645)

the defendant theaters, right?

A. Yes, sir.

Q. And now during the entire period that you were with Mr. Sley and up to the period of this lawsuit the Randolph Theatre, which is a big theatre—how many seats does Goldman's Randolph have?

A. Two thousand.

Q. Twice as much as yours?

A. Yes, sir, just about.

Q. (continuing) Played SUMMERTIME, which is a million four and AMBASSADOR'S DAUGHTER, which is $951,000. I think we have seen the figures, haven't we?

A. Yes, sir.

Q. So that that is correct.

A. Yes, sir.

Q. And it is also true that with respect to United Artists pictures and Stanley Warner theaters, the three theaters that it operates, that by hindsight, taking the national film rental on the averages, that your national film rental on those pictures that you played were much higher than the national film rental as it turned out of the picture Stanley Warner played, right?

A. What was Johnny Concho?

Q. Pardon?

(1646)

A. What was Johnny Concho?

Q. What do you mean, what was? It was a picture.

A. Well, I know it was a picture. I am talking about the national gross.

Q. We will give it to you, but I don't see how that is going to help you answer this particular question.

A million five.

A. Then we were better.

Q. Then you were better?

A. We were better. That was a Sinatra picture. That is the reason I mentioned it.

Q. All right, I see, excuse me then.

So that you are telling us that your Viking Theatre had a much higher national film rental on all the pictures it played than Stanley Warner at all the theaters it played, right?

A. On United Artists products.

Q. That is right.

A. Yes, sir.

Q. The Stanley Theatre, how large is that theatre?

A. During the period of the suit about 2900 seats.

Q. That is about three times your size, right?

A. Yes, sir.

Q. They played only two United Artists pictures during this

(1647)

entire period of this lawsuit: GENTLEMEN MARRY BRUNETTES, which is a million one, and STAR OF INDIA. What do you think the STAR OF INDIA national film rental is?

A. $400,000.

Q. How much?

A. $400,000.

Q. $168,000. Did you ever play anything as low as that at your theater?

A. I don't know what REBEL IN TOWN did.

Q. Well, we will give it to you. REBEL IN TOWN, $435,000.

This STAR OF INDIA that played at the Stanley Theatre, three times your size, was $168,000, right?

A. Right, sir.

• • •

(1648)

Q. The United Artists picture SUMMERTIME is one of the three United Artists pictures of the 40 that they released during the period that you were at the Sley theatre about which you have stated some grievance. There are

three out of the 40-odd, and SUMMERTIME is one of those three, is that right?

A. Yes, sir.

Q. Now, at the time that you submitted a bid for SUMMERTIME, the United Artists picture, the Viking Theatre was playing another United Artists picture, was it not?

A. Yes, sir.

Q. NOT AS A STRANGER?

A. Right, sir.

(1649)

Q. And who were the stars in NOT AS A STRANGER?

A. Olivia de Haviland, Frank Sinatra and Robert Mitchum.

Q. That was a blockbuster, right?

A. It was a good picture. It wasn't as much of a blockbuster as MISTER ROBERTS.

Q. Was it a blockbuster?

A. It was a good picture, $6 million.

Q. Was it a blockbuster? Will you answer my question? And haven't you so testified?

A. It can be in the category of a blockbuster, yes.

Q. Then the answer to my question is yes?

Don't shake your head.

A. I said yes.

Q. Thank you.

United Artists had just granted you the award over others who had bid for that picture and you know the others who bid, don't you?

A. I know that the Viking Theatre—I don't know the others that bid, no, sir.

Q. Don't you know that Stanley Warner and Arcadia and Trans-Lux all had submitted bids on this picture? You don't know that?

A. I know it now and I think it may have been brought to my attention, but I didn't know the names of them.

(1650)

Q. In any event, over any other bids United Artists had just given you the blockbuster NOT AS A STRANGER, right?

A. Yes.

Q. And you had done more business with NOT AS A STRANGER than any other picture you have ever played during the period of this entire lawsuit, right?

A. Right, sir.

Q. And the very next picture which came along was SUMMERTIME?

A. Yes, sir.

Q. That picture was not awarded to you and so you have this grievance here, right?

A. Yes, sir.

Q. And let us see what that grievance is, Mr. Wren. The United Artists made that picture available beginning August 3, 1955. That is the availability date to begin, right?

A. No. To begin I think it was a different one. This was the second time it was bid, was August 3rd, I think.

Q. Not that I know of, but in any event—

A. Well, it was bid once before.

Q. The grievance that you are talking about is the August 3rd solicitation.

A. Right, sir.

(1651)

Q. I don't know whether there was a prior one.

A. There was.

Q. I will take your word for it. So August 3rd was the bid, was the availability date?

A. Yes, sir.

Q. Now, you screened that picture?

A. Yes, sir.

Q. Incidentally, that was a picture which starred Katherine Hepburn and Rosanno—

A. Rosanno Brazzi.

Q. And it was the story of a schoolteacher who goes to Europe on a summer vacation and falls in love?

A. Yes, sir.

Q. Now, that picture, since it was a schoolteacher that takes a vacation in the summertime, they wanted it to open August 3rd. That is the height of the summer, isn't it?

A. Well, sir, part of the height of the summer, yes.

Q. And you knew that there had been a special Life Magazine article of publicity the preceding month announcing that this picture was going to come out August 3rd with Katharine Hepburn and Rosanno Brazzi, with a background of Venice, and so on; you knew that, didn't you, the publicity?

A. I don't think that the magazine article had anything to do about dates, sir—I mean the magazine ad.

(1652)

Q. Not ad, there was a special publicity story about Katharine Hepburn in this picture and scenes of Venice and so on. Didn't you know there was a publicity campaign?

A. Yes, I saw the publicity campaign but I don't recall any date in it.

Q. And you also knew that it had opened in New York with a very large advertising campaign there shortly before August 3rd?

A. Oh, yes. I think it was the early part of July.

Q. Now, at the time that you submitted your bid for a picture that was to open August 3rd you still had a picture playing in your theatre that had until September to run, right?

A. Another three weeks, yes, sir.

Q. So nevertheless—withdrawn.

So that you knew that because of a prior commitment, as you expressed it this morning, you would be unable even if you got SUMMERTIME to put it in your theatre on August 3rd? You knew that, didn't you?

A. Yes, sir.

Q. Nevertheless, you put in a bid and said you were ready to play it, your exact words were "Approximately on availability, August 3rd."

(1653)

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. At the time you put in that bid for SUMMERTIME on August 3rd you had NOT AS A STRANGER which had to run for three more weeks at least, right?

A. Yes, sir.

Q. Hadn't you just put in this bid to make a pretense of a bid so that you would have a claim in this Court?

Isn't that what you did it for?

A. No, sir. A cash guarantee is not pretense.

Q. All right, you have answered it. "No, sir" is your answer.

A. With an explanation. A cash guarantee is not a pretense. We put up cash for the picture.

Q. And knowing that if you got the picture you wouldn't be able to play it?

A. Until after STRANGERS.

Q. You still put up the cash?

A. Yes, sir.

Q. Well, let's see if that is so. At the same time that SUMMERTIME was being made available to you for August 3rd, Paramount had a good picture which was also available for August 3rd. Do you recall that picture?

May I help you?

(1654)

A. Yes, I wish you would.

Q. TO CATCH A THIEF?

A. Right.

Q. With Cary Grant and Grace Kelly.

A. Right, sir.

Q. And that happened to be available for the exact same date; the availability was August 3rd, right, sir?

A. Yes, sir.

Q. Didn't you advise Paramount that you wouldn't bid for that picture because you were already committed and you couldn't play a picture on August 3rd?

A. When did I advise them, before or after SUMMERTIME, sir?

Q. You tell me. When did you advise them?

A. I can't remember. That is the reason I am asking.

Q. Ah. Well, let me help you out.

Is this the telegram that you sent to Paramount—tell us the date—in which you told them that since the date was August 3rd you couldn't possibly bid for it, you had a picture in there?

A. I can't tell you the date from this, Mr. Nizer.

Q. I couldn't either, but Mr. Sawyer may be able to. Just a minute, maybe he can help us.

A. It fades out.

(1655)

(The document was shown to Mr. Sawyer.)

Mr. Sawyer: June 29th. However, I wouldn't want to take an oath on it.

(Discussion off the record.)

Mr. Sawyer: June 29th.

By Mr. Nizer:

Q. Let's give you the better one, the clearer one.

A. Good.

Q. Is that the telegram that you sent?
A. Yes, sir, it is.

Mr. Nizer: I offer it in evidence.

The Witness: May I explain?

Mr. Nizer: We will get along, sir, if you will just give me a chance to mark it.

(Telegram dated June 29, 1955, from Jay Wren to Mr. Ulrik Smith, was marked Exhibit D-14 (United Artists) for identification.)

Mr. Nizer: May I have Your Honor's permission to read this to the jury? It is brief.

The Court: Very well.

Mr. Nizer: Thank you, Judge.

Jay Wren sends this telegram to Ulrik Smith of Paramount:

Re your request for offer form dated June

(1656)

23rd, 1955, inviting us to submit an offer for a license to exhibit the motion picture, TO CATCH A THIEF, first run Philadelphia. Inasmuch as you advised us by phone today that TO CATCH A THIEF was available on or about August 3rd, and due to the fact that we have a prior commitment, namely, NOT AS A STRANGER, the Viking Theatre is unable to submit an offer for TO CATCH A THIEF.

However, please continue to afford the Viking Theatre the opportunity to submit offers on all of your future releases.

Regards,

Jay Wren, Gen. Mgr.

By Mr. Nizer:

Q. So that—

Mr. Sawyer: The witness asked if he could explain.

By Mr. Nizer:

Q. What would you like to explain?

A. This wire was sent to Paramount the day before NOT AS A STRANGER opened, June 29. NOT AS A STRANGER opened on June 30. We knew nothing about STRANGER, as to how well it would do. So rather than try to tie up product June 29, before we opened STRANGER we sent that wire. Because the bid

(1657)

due date on CATCH A THIEF was the day before we opened NOT AS A STRANGER.

Q. Well, Mr. Wren, that is self-contradictory. If you didn't know how well NOT AS A STRANGER would do how did you know you were going to be tied up on August 3rd?

A. Because I had a ten-week commitment starting June 30.

Q. Then you did know that no matter how well it did or how poorly it did you were going to be tied up, didn't you, when you sent this wire?

A. Yes, sir. I did.

Q. And therefore, knowing that you were going to be tied up you advised Paramount on an outstanding picture with Grace Kelly—

A. Yes, sir.

Q. —and Cary Grant, "Not interested, am tied up" right?

A. Yes, sir.

Q. But for the same date of August 3rd with United Artists' picture SUMMERTIME you say, "I am putting

in a bid with a guarantee for August 3rd'' and you knew the same fact that you were tied up, didn't you?

A. No, sir, the difference being that this picture was bid on July 14 for August 3rd availability and in July by that time United Artists had earned at the Viking Theatre almost $45,000 in film rental and were well aware of what was known

(1657a)

as performance, that they had always insisted on, and in addition to that we put up a cash guarantee for SUMMERTIME to open approximately on availability, which in this instance would have been following NOT AS A STRANGER.

(1658)

Q. Let's see what you have told us. You are telling us that in July you knew—

A. Mid-July, sir.

Q. —mid-July you knew that NOT AS A STRANGER was a successful picture?

A. Yes, sir.

Q. The most successful you had ever had in your theatre?

A. Yes, sir.

Q. Therefore, you had no fear that it would end sooner; you knew that you would live up to your commitment of ten weeks, right?

A. Yes, sir.

Q. Therefore, if anything, the fact that you knew it was a success assured you that you would be tied up with NOT AS A STRANGER past August 3, right?

A. Yes, sir.

Q. Nevertheless, knowing that you were going to be tied up past August 3, you submit an offer for an August 3rd date on SUMMERTIME when you have rejected an

offer from Paramount for the same date on the ground that you have no room for it, didn't you?

A. That's right, sir. On June 29th we rejected the right to bid for CATCH A THIEF.

(1659)

Q. The guarantee, incidentally, that you offered for TO CATCH A THIEF was $12,500?

A. Yes, sir.

Mr. Sawyer: For what?

The Witness: SUMMERTIME.

By Mr. Nizer:

Q. I mean for SUMMERTIME. I beg your pardon. For SUMMERTIME it was $12,500.

A. Yes, sir.

Q. And the distributor was to pay all the advertising expense.

A. The same deal as he had on NOT AS A STRANGER. Yes, sir, but with the same deal that he had with NOT AS A STRANGER.

Q. So the answer to my question is, yes, that the distributor was to pay all the advertising?

A. Yes, sir.

Q. Thank you. And that advertising over a period of a couple of weeks in the case of LUCY GALLANT, another Paramount picture, was $7,000 deducted from the distributor's amount, wasn't it?

A. I would assume it is about that, yes, sir.

Q. So that what you were really offering was $12,500 minus a minimum, you were going to play it at least three weeks, of $7500. You were really offering a net guarantee of only

(1660)

$5000 for that picture, weren't you, in effect?

A. No, because if United Artists said they wanted to spend $3000 for advertising, I was stuck with it.

Q. You didn't have any control?

A. Well, did I?

Q. Did you insist upon any?

A. I don't remember what the bid was.

(1664)

Q. Now, let's continue with the main stream of what I was asking you about.

There was another Paramount picture which was available for August 3, at the same time that SUMMER-TIME was available for August 3, and, to help you out, it is WE'RE NO ANGELS with Humphrey Bogart, Joan Bennett, Peter Ustinov and Basil Rathbone. Do you recall that one?

A. What was the bid due date, sir, please?

(1665)

Q. I will give it to you if that will help you. June 3, 1955.

A. June 3.

Q. Yes, sir.

A. Yes, sir.

Q. Now, my question is, that was available for August 3?

A. That's right, sir.

Q. And didn't you likewise as early as June 3 send a notification to Paramount "I cannot bid and negotiate for the picture because I am tied up with NOT AS A STRANGER"?

A. I don't know whether I said STRANGER. I probably told them it was due to a prior commitment, namely, NOT AS A STRANGER; maybe I listed other pictures.

Mr. Nizer: May I have your copy, Mr. Steinberg, please? It is a little clearer, I think. Thank you.

I offer this in evidence. Any objections?

Mr. Sawyer: No objection.

(Telegram from Jay Wren to Ulrik Smith, Branch Manager, Paramount Film Dist. Corp., Philadelphia, Pa., was marked Defendants' Exhibit 15 for identification.)

Mr. Nizer: May I read this, please, Your Honor?

The Court: Yes.

(1666)

Mr. Nizer: Mr. Wren sends this telegram on June 13.

Re your Request for Offer dated June 8th, 1955. Owing to prior commitment namely, NOT AS A STRANGER, the Viking Theatre is unable to submit an offer for the motion picture, WE'RE NO ANGELS. Please continue to afford the Viking Theatre the opportunity—

By Mr. Nizer:

Q. So you turned down another picture which had an availability date of August 3 because you had NOT AS A STRANGER?

A. Yes, sir, and prior to STRANGER.

Mr. Sawyer: I would like to show him this request and see what the availability date was.

There is a document involved, Your Honor, and I think he should have it, Your Honor, as he is being asked about request for offer and the availability date is shown on there and I think the witness should have it before him.

Mr. Nizer: Here are the two. It was twice around. One was July 14th availability date and the other was August 3rd.

Mr. Sawyer: We have no document, Mr. Nizer, that we can accept except this, I take it. What is that?

(1667)

Mr. Nizer: This is the copy of—I won't argue with you, sir. I will take July 17. It doesn't matter with me.

By Mr. Nizer:

Q. You turned down the picture at Paramount which had an availability date earlier than August 3rd because you were still tied up with NOT AS A STRANGER?

A. Yes, sir.

Q. And you were just as tied up with NOT AS A STRANGER on August 3, and you were going to be tied up for a few more weeks, to say the least, right?

A. I told you three additional weeks, yes, sir . . .

• • •

Mr. Sawyer: Your Honor, I have asked if the witness may see the document that has the availability on it. I think he is entitled to see it.

Mr. Nizer: There is no question about seeing it. There are two of them, Your Honor, August 3rd and July 17th.

(1668)

Mr. Sawyer: There are not two of them, Your Honor. I don't know what sheet Mr. Nizer has.

(Document is handed to the witness.)

The Witness: This, sir, is not an availability sheet.

By Mr. Nizer:

Q. It is a copy of those notices.

A. This is a request for offer that says "Available on or about July 14, 1955, WE'RE NO ANGELS."

Q. That is exactly what it says and I have already asked you, you turned even down a July date on the ground that you were tied up with NOT AS A STRANGER.

A. I didn't even know—

Q. Please answer my question. The answer is yes?

A. Yes, sir.

Q. And you also turned down another picture, CATCH A THIEF, on the ground that it was August 3rd and you were tied up?

A. Yes, sir.

Q. But you are now complaining about SUMMERTIME which was also August 3rd in which you put in a bid when you knew you couldn't play it?

A. I didn't put in a bid. I say approximately on availability.

Q. And that means what date, approximately on availability?

(1669)

A. I would like it explained by the film companies what it means.

Q. On or about approximately on availability.

A. I have been waiting for years for the film company to explain that to me. I have a letter in the file from Metro which says "Two weeks one way or the other."

Q. And if it was still two weeks you would still be in the prohibited area of your engagement, wouldn't you?

A. Not necessarily, no, sir.

Q. You said you had three more weeks to play?

A. Yes, sir, but there was also a clause in the contract which says United Artists can give me three weeks and take the picture off.

Q. You are telling me when you say to availability date August 3rd, I will play approximately on availability date, that you take that to mean an area of about two weeks; is that right?

A. Yes, sir, in this case it would have been. In this case it would have been three weeks.

(1670)

Q. What date would that be?

A. Either the 24th or the 30th of the month. I don't have a calendar here.

Q. August 3rd. Would you figure it out for me. I just want to follow you.

A. It would be 10, 17,24.

Q. Yes. Of August?

A. Yes.

Q. That is August 24. And you played NOT AS A STRANGER until when?

A. I played it twelve weeks.

Q. To September 21st, right?

A. Right, sir.

Q. So that you knew no matter what "approximately" would stretch to you were going to be tied up, didn't you?

A. No, I did not, sir.

Q. Well, let us do it slowly and see.

A. I knew I would be tied up for ten weeks starting June 28.

Q. And that is past the outside limit of what you call "approximately," isn't it?

A. It is not what I call "approximately." I am explaining to you that that is what has been called that by film companies with me.

Q. Mr. Wren, when you wrote to Paramount, or rather sent a

(1671)

telegram—withdrawn.

When you advised United Artists that you would bid on or about August 3rd, that availability, did you know that you were going to be tied up at your theatre with

another United Artists picture NOT AS A STRANGER as late as at least the middle of September?

A. No, sir.

Q. How long did you think you were going to be tied up?

A. I had all of July and all of August and probably the first week in September.

Q. Figure it out, sir. If you had—

A. I don't have the play dates here, sir.

Q. If you had ten weeks, ten weeks would take it to September 8th, will you take our calculation on that?

A. Yes, sir.

Q. All right. Therefore when you said: I will play SUMMERTIME on or about the availability of August 3rd you didn't think that that meant after September 8th, did you, more than a month later? Did you?

A. Did I say on or about, or approximately on availability?

Q. Approximately. Either way. I am not sure of the language. Whatever it is. It doesn't make any difference to you on or about or approximately?

A. No, I would just like it explained to me.

(1672)

Q. Sir, you are a witness in this case for the plaintiff.

A. Yes, sir.

Q. I am not. Will you please do the explaining to me. You brought a charge here. You are asking for a lot of money, and I am asking you, when you sent that notice, didn't you know that you couldn't play that picture and you were just making a record in this case?

A. No, sir, and United Artists knew I couldn't open the picture.

Q. Didn't you know when you sent that notice to Paramount that you had told Paramount you couldn't take a picture for August 3rd, you were tied up?

A. Yes.

Q. You knew it then, didn't you?

A. Yes.

Q. You knew it as early as June, and you knew when you notified Paramount on the second picture, namely, CATCH A THIEF, is that the name?

A. That is right, sir.

Q. You knew then that August 3rd was impossible for you, on or about, approximately, the same kind of qualification?

A. Plus another reason on CATCH A THIEF. To get the picture we would have had to put up considerable money, and you could have never followed after the holidays with that picture.

(1673)

Q. You never said that in your telegram.

A. No, sir, I didn't.

Q. You told them you had NOT AS A STRANGER.

A. Right, sir.

Q. That is a new thought you just had on the stand, isn't it?

A. That is a thought that is always running through anybody's mind bidding for pictures.

Q. When you sent the telegram to Paramount, which I just read, you said: I cannot bid for August 3rd—

A. Right, sir.

Q. —since I am tied up with NOT AS A STRANGER.

A. Right, sir.

Q. But to SUMMERTIME you say: I will take SUMMERTIME on August 3rd, don't you?

A. Yes, sir.

Q. And you knew at that time that you couldn't play it on August 3rd, didn't you?

A. Yes, sir.

Q. And you knew that you couldn't play it August 10th, didn't you?

A. Right, sir.

Q. And August 17th you knew you couldn't play it?

A. Yes, sir.

Q. And August 24th you knew you couldn't play it?

(1674)

A. Right, sir.

Q. And September 3rd you couldn't play it?

A. Right, sir.

Q. Now your grievance is with respect to a picture for which you made an offer which you knew yourself that you couldn't play on the availability date; that is your grievance in this case?

A. Mr. Nizer, my grievance is twofold.

Q. No, no—

A. Mr. Nizer—

Q. —please answer mine: Is that your grievance or isn't it?

Mr. Sawyer: No, no, you asked him what his grievance was.

The Witness: My grievance is twofold.

By Mr. Nizer:

Q. Yes?

A. Mr. Goldman bid for ROMEO AND JULIET and was awarded the picture, it played fifteen weeks off of availability at the Midtown Theatre, followed COUNTRY GIRL. Instead of living up to his commitment of five weeks, played it nine days.

Will you please check me on that, sir?

Q. I will not only check you, Mr. Wren, but when I get to that subject I am going to call your attention to your statement.

(1675)

A. Thank you.

Q. And now will you come back to the question I asked you, instead of being a lawyer. I asked you whether you didn't know at the time that you were making this pretended bid for SUMMERTIME that you couldn't play that picture if you got it.

A. I knew it and the distributor knew it, but to give him insurance—

• • •

Q. My question is, did you know when you made that proposal to United Artists that you couldn't play the picture even if they gave it to you. You knew that, didn't you?

A. On the 3rd of August, yes, sir, I knew it.

Q. Or up to September sometime.

A. Yes, sir.

Q. Incidentally, the Randolph Theatre got SUMMER-TIME; that is the complaint you are making.

A. Yes, sir.

Q. The Randolph is Goldman's theater?

A. Yes, sir.

(1676)

Q. Do you know when they started to play it?

A. I think it was on availability.

Q. They played it right on the date that United Artists asked them to play it, right?

A. Yes, sir. With an explanation.

Q. You are going to explain for Goldman, I assume, are you?

A. No, sir, I am going to explain that it wasn't according to his deal, that he didn't live up to his claim on the picture.

Q. And that is a grievance that you have, is it?

A. Yes, it is, I am held to every contract.

Q. I see. You want to go over the deals of a lot of other competitors to find out if anything happened to them

in which there was something that is changed in the deal. Were things ever changed with you in your deal?

A. I was told by—

Q. No, answer my question.

A. No, sir.

Q. No, sir?

A. Only on one picture with United Artists, the DESERT SANDS.

Q. What happened?

A. They adjusted the picture for me.

Q. How?

A. Well, they gave me a reduction in terms.

(1677)

Q. Gave you a reduction in terms? Do you think that gives Goldman a grievance against you?

A. If he so desires, yes, sir.

Q. He could sue you for that, could he?

A. If he bid on the picture?

Q. Yes.

A. If he bid on DESERT SANDS.

Q. So that you did something on DESERT SANDS that you say is so improper that your competitor has a right to sue you. That is your opinion about it, is that so?

A. If he bid on DESERT SANDS and he feels he should sue me, postitively.

Q. And you admit now that that was wrong for you to take that adjustment?

A. No, sir, I do not. I went to United Artists and asked them for an adjustment on the picture and United Artists granted me the adjustment. I did nothing wrong.

Q. And so similarly I guess you will grant the same thing to any competitors, if your competitor goes to United Artists and gets an adjustment, you don't consider that wrong either, do you?

A. But he did not, United Artists told him not to take off the picture before eight weeks that he was committed

for and he did take off the picture, and United Artists did nothing

(1678)

about it.

Q. Now, are you enforcing the rights of United Artists here?

A. No, sir.

Q. And, incidentally, you know that Stanley Warner also bid for DESERT SANDS, the picture you got an adjustment on?

A. I explained that bid, sir.

Q. Yes, and therefore you think they too had a real grievance against you?

A. They bid it as a second feature 20 per cent, and if they care to bring action against us, it would be just one of many.

Q. Yes. You are sued often?

A. Yes.

Q. Now, during the period of this lawsuit the Randolph Theatre, the Goldman's Randolph Theatre had not obtained a single United Artists picture until SUMMERTIME, had it?

A. The Randolph?

Q. Yes.

A. No, the Goldman chain had, but not the Randolph Theatre.

Q. And this picture SUMMERTIME is the first picture that the Randolph played while you were playing eleven United Artists pictures, right?

A. Not of the quality of SUMMERTIME. I was playing eleven United Artists pictures as was he at the Goldman and the Midtown, but not of the quality—

(1679)

Q. Excuse me, Mr. Wren, I didn't ask you about quality.

A. All right, sir.

Q. Stop arguing with me, but since your raised the subject, you had a far higher quality than any of your competitors of United Artists, and that is NOT AS A STRANGER, right?

A. With the big cash guarantee. That is the reason I got the picture.

Q. I didn't ask you with a guarantee, will you stop—

A. Yes, sir.

Q. That is right. Please be fair with me. Just answer my question if you can.

A. Right, sir.

(1680)

Q. A few moments ago, when you were making one of your answers, you told me that as you understood it, when you said April 3rd, you thought you had at least three weeks leeway on the date that they gave you as availability. Do you remember that answer? I said two weeks, you corrected me, you said three weeks.

A. Pardon me, sir, I did not say I had three weeks' leeway. I said, if I remember correctly, that I had three weeks to go on NOT AS A STRANGER.

Q. No, no, I am not talking about that. You said that too.

A. Right, sir.

Q. But I am—

A. Now, as far as approximately on availability is concerned or on about availability, I would love to have a definition of that from the distributor.

Q. That is very interesting, but I am asking you a question. I do not care what you would love to have, sir. My question is, did you say that when you have a date of August 3rd and you submit a bid, instead of giving August

3rd, you feel that you have an elasticity, let us say, of about three weeks. When you say "approximately on availability date" do you take that to

(1681)

mean a three weeks' range?

A. No, sir, I do not.

Q. You do not?

A. No, sir. That is given to the—

Q. Didn't you say that before? Listen to me and answer, please: Didn't you say that before?

A. I don't recall having said that, sir.

Q. What would you say now? What is the range when a company says to you available on August 3rd; what is the range of your acceptance? Can you say August 5th, 6th, 10th, 15th?

A. Here is a clear indication—

Q. No, answer my question.

A. Yes, sir. With an explanation.

Here is another clear indication that with the Viking Theatre it is August 3rd, but that didn't apply with ROMEO AND JULIET.

Q. Was it always August 3rd?

A. Oh, yes, sir. I—

Q. Haven't you shifted availability dates like every exhibitor under exigencies? Haven't you, now, Mr. Wren?

A. Mr. Nizer, every picture I get I am asked, When are you going to open the picture? before the picture is ever awarded to me.

(1682)

Q. Sure. So is everyone else asked that. But my question is, when you find yourself in some kind of booking difficulty have you ever had that? Haven't you moved pictures forward and backward?

A. Very seldom, sir. I think you can count them on two fingers.

Q. Well, let us start with the two fingers. You have done that, haven't you?

A. I am trying to recall.

Q. From your experience as a theater operator isn't it a practical matter that unless there is a specific reason for opening a picture, let us say a holiday, or a summer date, like this one, August 3rd, they wanted to get it out nationally on a particular date, had a special campaign—but take the average picture, and if you find yourself in difficulty after you have bought it, and you have said I will play it on August 3rd, then you say, Now, look, I held over the other picture, it is doing well, and I can play it another week; will you shift it to August 10th; isn't that done in the business regularly?

A. Not for us, sir, no.

Q. Do you say it never happened to you?

A. I didn't say it never happened to us. You said—

Q. It isn't done regularly to you?

(1683)

A. Oh, I should say it is not, sir.

Q. But it—

A. May I explain further?

Q. No.

But it has happened to you. If you will be good enough to explain in answer to my questions we will get along faster.

A. It happened to me, yes, sir. With an explanation.

Q. Well, suppose you save this explanation so that I can get ahead, not because I don't want to hear it, I am very interested.

Did you testify in the Universal suit when Universal sued you for the film rental; do you remember that suit?

A. I never testified in that suit, sir, except in depositions.

Q. I meant that, excuse me. I didn't mean to mislead you. I mean testified in deposition.

A. Yes, sir.

Q. Let me read to you what you said at page 227:

Are there any other factors?

you were asked:

Are there any other factors that you took into consideration in evaluating these bids, or comparing them, to determine which is the better bid or which is

(1684)

the best bid.

A. First and foremost, availability.

Q. What do you mean?

A. If I were a branch manager?

You said that.

What is a branch manager?

A. A branch manager is in charge of the distribution organization's local office.

Q. He is on my side of the fence?

A. Oh, yes.

Q. He represents my company?

A. Yes, sir.

Q. So you are assuming that you are United Artists for a minute. You are the branch manager of United Artists or Paramount, whatever it is?

A. I was asked if they wished me to assume that I was.

Q. Yes.

A. Yes.

Q. I don't mind your dreaming.

You said you would put it that way.

The questioner said:

You can put it that way.

If I were a branch manager?

you asked, and the questioner said:

(1685)

You can put it that way.

You answered:

If the picture is available at a given date, say, September 15, the first thing I would consider as branch manager is what house I could get it in on availability. For a number of reasons—

Here is one of your explanations—

And in this particular instance, if it were a three- or four-week bid I know I would be assured of Christmas—

A. September to Christmas? I am sorry.

Mr. Sawyer: Your Honor, the witness has marked in this copy December 15.

Mr. Nizer: All right.

Mr. Sawyer: I suppose he did that before initialing it, because it wouldn't make sense otherwise.

Mr. Nizer: I will accept that. It doesn't matter.

By Mr. Nizer:

Q. (continuing) I would be assured of Christmas and New Year's, and that is the playing time I would shoot for.

A. Right, sir.

Q. If you were United Artists.

A. Yes, sir.

(1686)

Q. I would not care to release the picture to any exhibitor who could not play it on availability, for the reasons given.

Did you make that answer?

A. I certainly did.

Q. So if you were the branch manager of United Artists—

A. Yes, sir.

Q. —and you received a bid from a theater like the Viking—

A. Yes, sir.

Q. —that expected to play it after NOT AS A STRANGER, in September—

A. Yes, sir.

Q. —the 20th—you would turn him down, wouldn't you?

A. But the deal I accepted was—

Q. Just answer the question before "but."

A. I would turn it down.

Q. The answer is you would turn him down?

A. I would turn down that, which they did, and the deal they accepted they did not enforce.

Q. The deal they accepted as far as availability was played on August 2nd, not August 3rd, isn't that a fact?

A. I don't know.

Q. Well, I am telling it to you, and your counsel can check it, they played it on the dot, a day ahead of August 3rd; you

(1687)

know that, don't you?

A. No, I did not know they played it the day ahead.

Q. If you do know that, that makes a difference then, doesn't it?

A. It shows they don't have to play it August 3rd.

Q. Oh, you mean that by going to August 2nd—

A. Up again, that is right, sir.

Q. You are not serious about that?

A. Oh, yes, sir.

Q. That is a little joke?

A. No, it is not a little joke.

Q. Do you mean that because they played it not on August 3rd but August 2nd they varied it, but your playing it September is all right?

A. Mr. Nizer, you were the one—

Q. Will you listen to my question.

A. No, it is not all right.

Q. Incidentally, your bid for SUMMERTIME was 90/10 over theater expenses $4970.19, for three weeks.

A. The same as STRANGER.

Q. There is that figure, $4970.19. That is very precise, isn't it. That figure?

A. Those are the figures given me by the office, which were put on the NOT AS A STRANGER contract.

(1688)

Q. They were given to you by the office, but you know they are incorrect, don't you?

A. No, sir, I do not.

Q. Have you ever looked at the income tax report of what your expense are and how much they come to a week?

A. I have no interest in the income tax because I have nothing to do with it, sir.

Q. But as an experienced operator do you have any idea as to whether your expenses really were $4970.19, or $1000 less than that a week? Do you have any idea about that as an experienced operator?

A. Mr. Nizer, as you well know, the house expense figures of every contract in Philadelphia, nine out of ten —ten out of ten times are arbitrary figures, representing the distributors, not everybody.

Q. I am not asking you whether they are arbitrary, my question is, were yours dishonest.

A. No, sir, I put down what I was told to do by my home office at the time the picture was bid.

Q. You mean you don't know whether it was dishonest or not—

A. I certainly do not.

Q. —but you were told to put them down?

A. I don't know what you mean by the word "dishonest."

Q. Not correct, that it wasn't $4,970.19, it was $3900.

(1689)

A. Mr. Nizer, on the bottom of the contract that we signed, and which was accepted by Mr. Schaeffer, it says, as you have the right to audit. And why they did not avail themselves of that opportunity I do not know. But their right was given them, right on the bottom of that agreement.

Q. Well, you happen to be all confused about it, but I won't argue that with you. Will you answer my question. You knew that $4970.19 was an incorrect figure of your expenses?

A. I did not, sir.

Q. You do not know one way or the other?

A. No, sir, I do not.

Q. Now, in any event, that offer of 90/10 over theater expense of $4970.19 for three weeks means this—we have had you read these off so often, I hope you will be patient with me, for the benefit of the Court and jury, if we explain that for a moment.

A. Surely.

Q. I know you know what it means. It means that the first dollars that come in at the box office, under your kind of bid, 90/10 over theater expense, that the first $4970.19 goes to you, that is, the Viking Theatre?

A. Yes, sir.

Q. And the distributor who put the picture in your theater doesn't get a cent until you get $4970.19, right?

(1690)

A. Right, sir.

Q. Now, in this case was there an advertising expense also to be paid?

A. Yes, sir.

Q. By whom?

A. United Artists.

Q. So that on top of that if you spent, let us say, how much did you spend at this time approximately a week for advertising?

A. I don't know what they spent on SUMMERTIME, sir.

Q. Well, generally what would you spend on a picture for United Artists?

A. Depending on the company. If they come in and say, We want to spend $4800, that is the campaign.

Q. So that too would be paid by United Artists?

A. Yes, sir.

(1691)

Q. So that it can happen, can it not, on the kind of offer that you made, that you get back all your cost of operation, all your expenses—that includes your salary and Mr. Sley's salary and whatever they are, all expenses, taxis, whatnot, operations—

A. Mr. Sley has no salary at the Viking Theatre.

Q. From the Viking.

A. Of any type or description, sir.

Q. Well, all right. Your salary?

A. Yes, sir.

Q. All of it?

A. Yes, sir.

Q. In any event, every expense of the theatre, including rent and interest, everything else that an accountant figures in an operation?

A. Yes, sir.

Q. You could get that back and the United Artists or the company would have to pay all the advertising expense. It is possible under such an offer as you made for the company to lose money while you come out all right, isn't it?

A. We were assuring them of $12,500 to help them to come out on the so-called expenses. We were putting a $12,500 guarantee up.

Q. Listen to my question because perhaps I—this may not

(1662)

be your fault at all. I am talking generally, not on SUMMERTIME.

When there is a 90-10 bid over house expense it is possible, is it not, for the distributor to lose money while the exhibitor comes out with a profit, or at least all of his operational costs and expenses?

A. Certainly.

Q. It is?

A. Certainly.

Q. And that has happened to you, hasn't it, with one of these companies that I represent, at least once that you know of?

A. Paramount.

Q. It happened with Paramount?

A. Yes, sir.

Q. What is the picture?

A. LUCY GALLANT.

Q. You made $3,000 profit on that picture, roughly approximately, according to you?

A. I don't think it was that high but we made a profit.

• • •

(1693)

Q. The answer is Paramount lost while you made a profit, so they gave you a picture, you played it in your theatre, you made some $3,000 profit and Paramount lost money on that picture didn't it? For the right of playing it in your theatre they took a loss of what, $3,000, roughly?

A. I don't know what their losses are, sir.

Q. You don't.

A. No.

Q. Didn't they tell you?

A. I don't know what Paramount's losses are, sir.

Q. I don't mean losses in general, I mean on the engagement at the Viking Theatre. You know that they lost some $3,000 for the privilege of playing the picture in your theatre, don't you?

A. I don't know whether it was $3,000. I know they made no film rental.

Q. They not only made no film rental, they took a loss because they paid $7,000 advertising that was spent for your theatre, didn't they?

(1694)

A. In three weeks.

Q. That's right.

A. Yes, I assume you are right about that.

Q. Now, did you in that case, incidentally, go to Paramount and say, "Now, you gave me a picture, you lost $3,000 on this engagement. I want to give you back a couple of thousand"? You didn't do that, did you?

A. I certainly did not, sir.

Q. Do you consider a three-week 90-10 deal without any guarantee the kind of bid you make, or offer you make, when you don't like a picture? It is a very bad bid, isn't it, 90-10 three weeks?

A. Are you speaking of SUMMERTIME?

Q. No. I am talking of a bid 90-10 over house expense for three weeks. That is a very bad kind of a deal for the distributor, isn't that a fact?

A. Not necessarily.

Q. Haven't you testified that a 90-10 deal for three weeks over house expense is a bad deal for the distributor and a good deal for the theatre because he is sure of getting his money back?

A. Oh, yes, yes, yes, definitely.

Q. That is true?

A. Sure.

(1695)

Q. You have so testified?

A. Yes, sir.

Q. And you will stand by that?

A. Yes, sir.

Q. And you take back your answer a moment ago, "Not necessarily"? Necessarily it is a bad deal for the distributor, isn't it?

A. Right, sir.

Q. And when you make such an offer, which you necessarily know is a bad deal for the distributor, you can't really state a grievance when he turns it down, can you?

A. With reference to which picture, sir?

Q. On a whole series of them, but right now I am asking you a general question. If you bid 90-10 and three weeks without a guarantee, or two weeks in some instances, and the distributor turns down that offer, you don't blame him, do you?

A. It is his prerogative, sir.

Q. His prerogative.

Now, you have looked up the records of how the Randolph paid on this SUMMERTIME because they got the picture. It was far above your guarantee of twelve five, wasn't it? Or don't you remember?

A. I don't remember, no, sir.

• • •

(1697)

Q. With respect to United Artists, just one more question on this point.

Here is the sequence of three pictures, four pictures: You bid for NOT AS A STRANGER, the Frank Sinatra picture, and you got it, right?

A. Yes, sir.

Q. You bid for SUMMERTIME for an August 3rd date when you knew, you say, you couldn't play it then and you didn't get

(1698)

it, right?

A. Yes, sir.

Q. Two months later you bid for United Artists' picture THE BIG KNIFE, with Ida Lupino, Shelley Winters, Jack Palance, and you did get it, didn't you?

A. Yes, sir.

Q. And you also bid two months later for DESERT SANDS, a United Artists picture, and you got that?

A. Yes, sir.

Q. So you got the blockbuster NOT AS A STRANGER and several months later three other pictures from United Artists, and you are still complaining about SUMMERTIME in between, right?

A. Yes, sir, I am complaining.

Q. Now, the other United Artists picture that you still have a grievance about is GENTLEMEN MARRY BRUNETTES. That picture was made available for October 5, 1955, correct?

A. I assume if that is what is on there, yes, sir.

Q. Now, your bid rejected that—

Mr. Sawyer: May we have the availability bid?

Mr. Nizer: I will if you want it.

Will you please give it to Mr. Sawyer. And may I continue, sir, in the meantime?

(1699)

Mr. Sawyer: Yes. I would like to have that.

Mr. Nizer: We will give it to you.

By Mr .Nizer:

Q. Your bid rejected the availability date and proposed another availability date of September 22, 1955. That is how many weeks before October 5? You moved it for-

ward. You said, "I will take this picture if you give it to me three weeks sooner," right?

A. If I said that, yes. I spelled out the date I wanted it.

(A document was handed to the witness by Mr. Sawyer.)

Mr. Nizer: May I have 33?
Oh, is that it?

Mr. Sawyer: Yes.

By Mr. Nizer:

Q. Take a look at how you replied to the availability of October 5. Read it out loud, maybe we can save time.

A. It is not in here, sir.

Oh, I am sorry, it is on the face here. I was talking about the back.

Two weeks if the picture is made available on or before September 22. If second week's gross equals or exceeds $10,500, picture will be held for a

(1700)

third week. See attached rider.

And the attached rider contains the bid.

Q. Now concentrating on the date, you made a conditional offer—withdrawn.

You made a conditional acceptance of their offer. They told you "It is available October 5" and you said "I will bid something if you give it to me September 22," right?

A. That's right.

Q. Do you consider it improper if the United Artists, having sent out that notice to all exhibitors, to all 12, for October 5, would you consider it improper if they had granted your request and given you the picture for September 22?

A. Mr. Nizer, when you say they sent it out to all 12 for bids—

Q. To all of the competing exhibitors. I believe all 12. But the point you make, you are not sure it went to only 10 or 11, is that your point?

A. Mr. Goldman does not bid.

Q. It is sent to everyone. You know that all notices are sent?

A. Well,—

Q. I am not asking you who bid. United Artists, was my

(1701)

qusetion, sends out a notice to everybody in the territory, indeed all over the nation.

A. I assume they do, yes.

Q. And we are agreed that they put in October 5 as availability throughout, at least the whole Philadelphia territory. Sometimes in other territories a different month, isn't that so?

A. Yes, sir, yes, sir.

Q. But I am talking of Philadelphia. Now, you come back and say "I will make a bid." Let's forget how good the bid is, but you change the date. You say "I will take it if you give it to me not October 5 but September 22."

A. Yes, sir.

Q. Now, suppose United Artists gave you September 22, said, "All right, we like your bid so we will move it forward." Let's assume they did that.

A. Right, sir.

Q. Would you consider that improper towards all your other competitors or not is my only question.

A. Not if they advised other competitors that they were giving it to the Viking on that availability, on the date that the Viking requested.

Q. In other words, you would say they would have to go back, would you, to everyone—

(1702)

A. Absolutely.

Q. —you say, "I am going to take the Viking bid because it is the best but want to explain to you that it is September 22"?

A. Oh, I don't mean that. I mean they should advise anybody else. "We are going to change the availability date to September 22, reject offers and re-bid," if they elect to do this.

Q. And if they granted it to you without doing that, you would say that it was wrong?

A. I would assume they had contacted other people.

Q. So that you don't consider the availability date—withdrawn.

If United Artists chooses to accept another bid which is in accordance with the availability date of October 5, you would consider that the mere date situation is enough to justify their sticking to their date? They may have a good reason nationally for that, may they not?

A. I wouldn't know the national reasons. They might have, yes.

Q. Just as you have a schedule of booking dates, so every distributor has a schedule of trying to get his money back by releasing pictures in a certain schedule, right?

A. I would say so, yes.

(1703)

Q. And just as you have a problem of getting your $4,957.19 back, they have a problem of getting millions of dollars back that are invested in these pictures, isn't that so, as a general matter, Mr. Wren?

A. I would say so, yes, sir.

Q. And therefore you would recognize their right, would you not, to require a certain availability date if they wish it and to accept a bid on the availability date that they have suggested rather than that somebody else suggests to them, right?

A. Yes, sir . . .

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(1704)

Q. I would like to ask you just one or two more questions about GENTEMEN MARRY BRUNETTES. That is the United Artists picture we were talking about.

Your offer there was 90-10 over house expense for two weeks and no guarantee, correct?

A. Yes, sir.

Q. And the distributor to pay all the advertising?

A. Yes, sir.

Q. You concede, do you not—you have testified, have you not—that that is a very poor offer for a distributor to accept, 90-10 over house expense without guarantee for two weeks?

A. Yes, sir.

Q. You have testified that that is a poor offer for a distributor to accept?

A. But it can be demonstrated in this instance that that offer was superior to the one he accepted.

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(1705)

Q. Mr. Wren, please answer my question, if you can. Is it not your position under oath that a 90-10 deal over house expense for two weeks with no guarantee and the distributor to pay for all advertising is a very poor deal for a distributor to accept?

Mr. Sawyer: Objected to, Your Honor. The question has been asked and answered.

The Court: I think he has already said that he agrees that it would be.

By Mr. Nizer:

Q. Is that so?

The Court: Is that right, Mr. Wren?

The Witness: Yes, sir, I have said that.

(1706)

Mr. Sawyer: With an explanation, Your Honor.

The Witness: With an explanation.

The Court: Pardon me?

Mr. Sawyer: With an explantion, Your Honor, which the witness is entitled to make.

The Court: All right.

By Mr. Nizer:

Q. I didn't hear any request for an explanation, but Mr. Sawyer has made it. Will you make one? What is your explanation of that answer that that is a poor deal?

A. When it can be demonstrated that the deal supposedly a poor deal would return far more revenue to the distributor than the deal he accepted, it then automatically erases any objections he may have to a 90-10 deal.

Q. Mr. Wren, if it can be demonstrated that black is white or anything else, it changes the color. My question to you is is it your position standing by itself that a 90-10 deal over house expenses, which means that you get all the expense of your operation, no guarantee for two weeks, is a poor deal for the distributor?

Mr. Sawyer: On this picture, Mr. Nizer?

Mr. Nizer: On any picture.

Mr. Sawyer: All right.

By Mr. Nizer:

(1707)

Q. Haven't you so testified?

A. Basically, yes.

Q. Thank you. And that is the deal that you made, that you offered for GENTELMEN MARRY BRUNETTES, right?

A. Yes, sir.

Q. Mr. Wren, when bids are submitted there are many factors that go into a consideration of which bid is the highest and the best, is that correct, many factors in that?

If you don't understand my question I will rephrase it.

A. I don't, sir.

Q. I see by your face that you are perplexed. I think this is something that I can make clearer.

Among the things that you have to consider in determining how good a bid is are lots of factors. For example, the financial terms offered, right?

A. You mean guarantee?

Q. Well, that breaks it into a lot of segments. First, the guarantee?

A. Right, sir.

Q. And it isn't always so that a guarantee makes it the best bid. If the picture exceeds the guarantee by a lot, if its potential is great, a small guarantee may be of less importance

(1708)

than if the picture is weak, is that so?

A. No, sir.

Q. Well, let's suppose a mathematical illustratio .. Suppose a picture like NOT AS A STRANGER, which grossed how much?

A. About $166,000, wasn't it?

Oh, wait a minute, I can tell you, it is right here in front of me.

Q. Oh, it is all right. I will take any figure you give, approximately.

A. $166,012.

Q. Now, suppose a picture that has that potential, with Frank Sinatra and all those other stars you have mentioned, and somebody makes a guarantee on that picture of

$10,000. That wouldn't mean anything in that case, just assuming that, would it? The $10,000 wouldn't be impressive on a picture that is going to gross $160,000, would it?

A. At the time the bids were submitted it might be very impressive if I was a branch manager and I had no other bids with guarantees.

Q. Well, if you were a branch manager and you had a fine theatre giving you let's say 50 per cent of all the income on a picture that you thought was going to do several hundred thousand dollars income gross because it had outstanding stars,

(1709)

and somebody else gave not 50 per cent but 10 per cent with a guarantee of $10,000, would that impress you if you were a branch manager, the second bid?

A. Well, definitely not, the 10%.

Q. Exactly. Therefore, you have to always evaluate the amount of the percentage, the amount of the guarantee against the potential of the picture, right? That is one factor. I am talking in generalities to you now, not any particular picture, Mr. Wren.

A. I understand, sir.

Q. And that is correct, isn't it? You have to evaluate those—

A. No ,sir. I—yes, you have to evaluate, but I will not agree to that evaluation.

Q. Do you have to evaluate preferred playing time? Is that a factor that goes into whether one bid is better than another?

A. Definitely.

Q. What does preferred playing time mean, just for the benefit of the Court and jury?

A. Holidays, Saturdays, Sundays.

Q. In other words, if a picture takes in July 4th weekend, that is preferable to the distributor because he is going to get a very important holiday play for that picture, right?

(1710)

A. Oh, surely.

Q. Or, for example, if a picture is going to play Labor Day, that is of some advantage, right?

A. Yes, sir.

Q. Now, forgetting holidays, let's take other considerations. We know that in the summer September is a weaker month than August for general playing?

A. Depending on the picture. Generally, yes.

Q. So that coming back to our old illustration, August 3rd for SUMMERTIME, which is a picture that should be played in the summertime, is a better date than September, generally speaking, right?

A. Generally speaking, yes, sir.

Q. And specifically speaking "No, sir"?

A. Not when there is a guarantee up as opposed to no money.

Q. Did you take into consideration the seating capacity? Is that a factor?

A. May I speak about seating capacity, sir?

Q. No. I am not asking for a lecture at this time.

A. The seating capacity—

Q. I will come to that some other time.

A. The seating capacity is not a factor.

Q. All right, that is an answer. You are telling me that in considering the value of a bid the number of seats that a

(1711)

theatre has is of absolutely no factor in the situation. Now, that is your answer?

A. Definitely, yes, sir.

Q. So that if you got a bid from Radio City Music Hall, assuming you were in New York for a minute, with its 5000 seats or 6000 seats.

A. Six.

Q. And from a theatre on 8th Avenue with 600 seats, the difference in seats would have nothing to do with whether you would accept one offer or another, it would just be what the guarantee was and other factors, is that what you are telling us?

A. No, because you are going to 8th Avenue. Now let's go to Broadway.

Q. I will take Broadway.

A. Let's go—

Q. Mr. Wren, listen first before you answer.

A. Yes, sir.

Q. I will transpose that question. Suppose you had a 600-seat art theatre, or any other kind, a beautiful theatre on Broadway, and Radio City with 6000 seats made an offer. I will just take your answer for whatever it is. Are you telling me that if you were evaluating the bids between those two theatres, the difference in seating capacity would not have

(1712)

anything to do with it? Is that what you are telling us?

A. I am telling you that, sir. I would go into the Music Hall for other reasons, not seats.

Q. All right. But I say the seats wouldn't even be a factor, according to your opinion?

A. No, sir, no, sir.

Q. How long have you been in this business, sir?

A. Well, since about 1933.

Q. Would the location of the theatre have anything to do with the bid?

A. No, sir.

Q. So if it was in a very fine location in a downtown section with a great deal of subway and traffic and fine department stores around it, or if it were on the side street some place, that wouldn't have anything to do with it, either?

A. No, sir.

Q. And would the skill of management have anything to do with it?

A. In what respect, sir?

Q. Well, suppose one operator was a very experienced, able man who understood showmanship, had been in the theatre business a long time, knew the values of how to exploit a picture and the other fellow was a sloppy operator, dirty washrooms, billboards not good, not skillful, would that make a difference?

(1713)

A. Oh, sure.

Q. Who the fellow was who was operating it?

A. Certainly.

Q. Oh, that would?

A. Yes, sir.

Q. Would the integrity of the operator make a difference if you were evaluating the bids? One fellows pays his bills and when he says something he means it. The other fellow you got to sue all the time. Would that make a difference?

A. Yes, sir.

Q. It would make a difference in favor of the fellow who pays his bills?

A. If the fellow lived up to the obligations.

Q. Would the past performance of the theatre, its past grossing potential not on one picture but generally how that theatre threw off grosses, would that make a difference in your opinion between one theatre and another?

A. I indicated that with NOT AS A STRANGER and SUMMERTIME. There was the performance. The same company, same distributor.

Q. You are telling me about one picture. We will come to that, too. My question now is general. I ask you whether the past performance of the theatre generally is an indication that a distributor has to consider as a factor.

A. No.

(1713a)

Q. No?

A. No, sir.

(1714)

Q. Does the amount of playing time that one exhibitor offers as against another make a difference? One fellow says, "I will give you ten weeks," the other fellow says, "I will give you three weeks," does that make a difference when you evaluate the bid?

A. If he is obliged to live up to what he guarantees you, yes, sir.

Q. The answer is, yes, in between the bids. I am talking of when you are looking at two bids and you want to consider their values, that's all. You don't have to argue your case, Mr. Wren.

A. Yes, sir.

Q. The answer to my question is yes.

A. Yes.

Q. Does the estimated film rental from the financial terms make a difference? In other words, the distributor says, "On these sliding scales—". Withdrawn.

Let's make it a little clearer. What is a sliding scale offer?

A. Where the exhibitor says that if the picture earns such-and-such a dollar, it will get such-and-such a per cent, such as the Viking 29 per cent to $9,000, 27½ per cent to $10,000, and when it goes right up to 50 per cent, from $18,500 on.

Q. Now, the sliding scales differ according to different

(1715)

bids. You may make different sliding scales for different pictures, so may other exhibitors?

A. Sure.

Q. So, therefore, when you compare it, you have one fellow starts out higher but drops faster in the second week, the other fellows starts out lower but keeps higher in the second week. That's all got to be considered, right?

A. I don't understand the second part of that, sir, it drops lower in the second week and keeps higher.

Q. Well, suppose the sliding scale starts with 40 to 50 per cent and then drops to 25 to 30.

A. I understand, yes, sir.

Q. Where as the other fellow goes from 40 to 50 to 35 to 40.

A. Right, sir.

Q. That has all got to be considered?

A. Yes, sir.

Q. And you also try to consider the estimated film rental that you might get from one sliding scale as against another sliding scale, right?

A. Certainly.

Q. You have told me that the past performance with a particular distributor generally would mean nothing. In other words, you tell me that the past performance of the theatre as a

(1716)

theatre is not a factor. I think that is what you told me before.

A. That's right, sir.

Mr. Nizer: Page 657.

By Mr. Nizer:

Q. Did you testify in a deposition in 1957 when you were listing these varying difficult factors that have to be considered in making a bid, "I would say, first and foremost, the performance that the theatre has shown—"

Did you make that answer?

A. If it is there I made that answer, yes, sir.

Q. And was it correct when you made it?

A. At 1957, yes, sir.

Q. And today, when you make that answer, is it incorrect?

A. Yes, sir.

Q. And when you made the answer in 1957 you weren't asked about 1957, you were being asked about the period in the lawsuit; you were discussing these bids?

A. Right, sir.

Q. Do you want to take back the answer you made a few seconds ago and stick by the one I just read to you?

A. For the period in sui. I will stick by that one. As of, now, I will stick by the one I just gave you.

Q. So that you will change your answer of a few moments ago

(1717)

to mean that that is not true if it refers to the period of the lawsuit. The answer you made a few moments ago, that past performance means nothing.

A. No, sir.

Q. You will eliminate that in so far as the period of the lawsuit is concerned, that it means a lot, doesn't it?

A. Yes, sir.

Q. Now, you understand from now on, so that we have no such confusion, that I am asking you at all times about the period of the lawsuit. You saw how careful I was to fix the dates, weren't you?

A. Yes, sir.

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(1718)

Q. I just asked you about the answer you made, "I would say, first and foremost, the performance that the theatre has shown, and, second, the guarantee."

(1719)

Now, I am going to read on two more questions there and then I am going to read what Mr. Sawyer would like to read.

"Q. And by 'performance' you mean past performance—"

Mr. Sawyer: Where are you reading now?

Mr. Nizer: The very next question. I am continuing. I am going to cover this subject for you if you want me to.

By Mr. Nizer:

Q. "Q. And by 'performance' you mean past performance; is that correct?

"A. With that particular company."

Right? Don't shake your head.

A. Yes, sir.

Q. As a matter of fact, I would like to stop there and say that is exactly what I was going to ask you next. The performance you are talking about is the performance that that particular distributor has had with his own pictures at the same theatre, correct?

A. Yes, sir.

Q. And that is a factor to be considered during the period of the lawsuit; is that correct?

A. True.

(1720)

Q. And the question that went on:

"Q. Exactly; on pictures of what the distributor believes to be comparable value?

"A. Yes."

Right?

A. Yes, sir.

• • •

(1722)

Q. Mr. Sawyer would like me to read this question to you.

"Q. Well, you just told me a little while ago that you believed the most important item in a bid is the distributor's knowledge of the past performance of that particular house with his product; correct?"

And your answer was:

"A. I said that was one of the schools of thought on Vine Street—"

And the questioner said:

"Yes."

And you said:

"A. —because we had been told time and again, 'you have no performance in your house,' and we are showing—"

You have been told by the distributor I take it you mean?

A. Yes, sir.

Q. And the question was:

"Q. Well, do you disagree with that?

And you said:

"A. —a past performance. It doesn't seem to have any weight with them, either.

(1723)

"Q. Well, do you agree that performance in your opinion should be the top factor?

"A. Yes. They should take it into consideration."

Mr. Nizer: That is all that you want me to read, sir?

Mr. Sawyer: Right.

By Mr. Nizer:

Q. Now, that merely confirms what I am trying to have you explain as a general matter, that you believe it is your conviction that the past performance of your theatre with the particular distributor whose picture is being considered is of real importance, correct?

A. Yes, sir.

Q. You agree with that?

A. Yes, sir.

Q. Now, you mentioned FOX FIRE before. That is a Universal picture?

A. Right, sir.

Q. Remember, you said you withdrew the offer on FOX FIRE because they held it up 13 days, that is, they didn't tell you within 13 days whether they would accept it.

A. That's right, sir.

Q. Do you remember you volunteered that and I promised you

(1724)

I would come back to it?

A. Yes, sir.

Q. You had submitted your offer on FOX FIRE, a Universal picture, you submitted a bid and 13 days later, on May 10th, you sent a telegram to Mr. Heiber, the branch manager of Universal, in which you said, "Inasmuch as we have waited beyond a reasonable length of time for a reply to our letter of April 28, we hereby withdraw the offer."

Do you recall that telegram so that I don't have to show it to you?

A. Yes, sir.

Q. So the only reason you gave for withdrawing your offer for FOX FIRE was that 13 days had elapsed and you weren't going to let your offer stand out any longer. Is that the only reason you gave?

A. You can't book, sir, waiting 13 days on answers.

Mr. Nizer: I move to strike it out.

The Court: Strike it out.

The Witness: That is the reason I gave.

By Mr. Nizer:

Q. The only reason you gave?

A. Yes, sir.

Q. Now, the truth of the matter is that the real reason you withdrew your offer was that you had been advised that you had

(1724)

won the picture NOT AS A STRANGER during that period and you didn't want to be stuck with FOX FIRE. Isn't that the real reason, Mr. Wren? Just answer yes or no to that.

A. No, sir.

Q. No, sir. Well's let's see.

You learned that you had won the picture NOT AS A STRANGER, this best picture you ever played, this block-buster, you knew that on May 3, 1955, didn't you?

A. I am not sure of the date.

Q. Well, within a day or two so that we will have no dispute about it.

A. Is that the day it was bid?

Q. No. It was the date you were advised that you had won the picture over all other bids, right?

A. Right, sir.

Q. On May 3, 1955. On May 10, 1955, you withdrew your offer for FOX FIRE?

A. Yes, sir.

Q. First of all, I ask you whether prior to May 10 you had met with Mr. Heiber of Universal?

A. I met Mr. Heiber many times, sir, prior to May 10.

Q. And did you at that time discuss the fact with him that you might be getting NOT AS A STRANGER and, therefore, wouldn't

(1726)

be able to take his FOX FIRE?

A. May I make a statement here with reference to FOX FIRE? The deal was made with Mr. Dana, I mean it was submitted to Mr. Dana.

Q. But Mr. Heiber is the branch manager?

A. Yes, sir. But it was Mr. Heiber's suggestion that I go to New York to see Mr. Dana, not to do business with him.

Q. Is that important in this?

A. Well, I wanted you to know that it wasn't Mr. Heiber.

Q. I appreciate your spelling it out. Now answer my question. You met with Mr. Heiber prior to May 10, when you withdrew your offer for FOX FIRE. My question is, did you tell him that you had been awarded NOT AS A STRANGER which would use up your playing time for that blockbuster? You did, didn't you?

A. I don't recall, sir. I may have.

Q. Nevertheless, you sent him a formal telegram that the only reason you are withdrawing FOX FIRE is not because you got NOT AS A STRANGER, which makes it impossible for you to play FOX FIRE, but the only reason is that it is beyond a reasonable time and you won't wait any longer. That is the telegram you sent them?

A. Yes, sir.

Q. And at the time you sent that telegram you knew that

(1727)

you couldn't play FOX FIRE even if they had given it to you; isn't that so?

A. I wanted to play FOX FIRE ahead of STRANGER, the same place I played WIZARD OF OZ.

Q. You are telling us now, are you—be careful of your dates. Do you want to check that answer before you give it to me so that I don't have to go into it?

A. That is where I wanted to play it, WIZARD OF OZ playing time.

Q. You wanted to play that instead of WIZARD OF OZ?

A. Yes, sir.

Q. I will come back to that.

Let me ask you this first. There were other pictures where the distributor took more time to decide on bids than 13 days and you didn't withdraw your offer, right?

A. I can't remember of one, sir.

Q. STUDENT PRINCE, 14 days later you got the picture.

A. I had nothing to do with STUDENT PRINCE, sir.

Q. Well, you had nothing to do with STUDENT PRINCE? I think we had that this morning.

This book, this gray book that you had, didn't you know what had happened, didn't you look at that book as to what had played this theatre and what had played its opposition when you took over the Viking Theatre for operation

(1728)

from your predecessor and manager?

A. No, I knew most of that without referring to the book.

Q. And you say you never saw that in the book?

A. I didn't check that book.

Q. Well, a good many of the entries on that book are yours, aren't they?

A. No, sir.

Q. Who makes the entries on that book?

A. The manager or the assistant manager and—

Q. At the theatre?

A. Yes, sir, at the theatre. And some of those were made by Mr. Comer himself or Mr. Manning.

Q. Now, under your regime who made the entries in that book?

A. On the sheets that I gave you today, they are made by my manager or the assistant manager at the theatre, and it is only a record of a product that has played, and I think in this instance we didn't start it until the end of 1956.

Q. And is that done under your supervision?

A. No. They are told to do it, to take it from the newspapers.

Q. Did you ever look at that book even at their entries to see what they had entered?

A. Oh, surely. I refer back to it often.

Q. Often. And do you also put in some of your own entries

(1729)

in your own handwriting?

A. I don't think there are any in there of mine. There may be, but I doubt it.

Q. And some of these entries that you say you never saw in your life are just an inch above the ones you made or your manager made for you?

A. No, they are not. That book of mine—Mr. Adams has the list that we now use and have used since I have been in the theatre. That book that he has there, I never used in the Viking Theatre?

Q. You never saw that at all?

A. I saw it but I never used that book. That was turned over to, I think the first time it was turned up is when these gentlemen came to the office.

Q. In other words, no entry in that book—let me mark it for identification so we know what we are talking about.

A. Yes, sir.

Mr. Nizer: May I have this marked for identification, please?

(A large gray book is marked Defendants' Exhibit No. 16 for identification.)

By Mr. Nizer:

Q. As I understand you now, so far as D-16 is concerned, this is a record you have not referred to or looked at at any

(1730)

time that you have been at the theatre. You use another record; is that right?

A. Yes, sir. Mr. Adams has it.

Mr. Nizer: May I have the other record, please.

By Mr. Nizer:

Q. The only record that you look at are these sheets?

A. Yes, sir.

(1731)

Q. D-16 then is a book of the Viking Theatre, D-16 for identification is a book of the Viking Theatre which you have never looked at until you saw it in this court this morning?

A. No. I didn't say that, Mr. Nizer. I have seen the book around the theatre. It was kept by Mr. Manning.

Q. No, please. Just tell me one thing first. You say you saw the book. Did you ever look at it? I understood you to say that. Now, if I am wrong, I want to be corrected.

What is your answer? Do you ever look at this book and study it?

A. No, sir, I do not.

Q. You have just seen it physically from the outside?

A. That's right. I never refer to the book.

Q. And until you looked at it this morning at the witness stand on the inside, you had never seen the inside before because you never looked for it?

A. I may have opened a page but I don't refer to the book. I have never used it for any reason.

Q. And the record that you do look at are these sheets?

A. These are the playoff sheets, yes, sir.

(1732)

Q. D-17. All right.

Now, let's get back to this, sir. I asked you whether there weren't other bids that you made where the distributor waited more than 13 days and you did not withdraw your offer, and you said you can't remember any and I am trying to refresh your recollection. That is where we are at the moment—

A. Yes, sir.

Q. —until we got off on this tangent.

Now, I mentioned STUDENT PRINCE. You said that is before your day?

A. Right, sir.

Q. Now, ON TRIAL, that is 13 days and then it was awarded to you. You didn't withdraw your offer on that?

A. What picture, sir?

Q. ON TRIAL.

A. Not ON TRIAL with me, sir; no, sir.

Q. I beg your pardon. That is Arcadia.

BIG KNIFE, that is yours, that was awarded 14 days after the bid was submitted. You didn't withdraw your offer there.

A. It was that long after the bid was submitted?

Q. Yes.

(1733)

A. You mean that is the license agreement date?

Q. That's right, September 13. Let me give you the dates and then you can check it out after the recess.

September 13, 1955—Mr. Steinberg—and it was awarded September 27; 14 days later.

Mr. Sawyer: Awarded, Mr. Nizer, is that the date of the license agreement? That is what we are not clear about.

Mr. Nizer: The date of the award. I am taking the earlier date. I suppose the license agreement took later but I think it is only fair to take it as of the date of the award.

The Witness: We will check it.

By Mr. Nizer:

Q. PICNIC, that was awarded—

Mr. Sawyer: How many days was it awarded?

Mr. Nizer: 13 days later.

Mr. Sawyer: Not to us, though.

Mr. Nizer: That was a withdrawal, wasn't it (addressing counsel)?

By Mr. Nizer:

Q. Yes, I am correct in here. You offered your bid on PICNIC on December 7, 1955; it was awarded December 20 to another

(1734)

theatre, not yours, but you did not withdraw your offer even though 13 days had elapsed in that case. That is what I am saying to you. That's correct?

A. I don't know when the picture was awarded. I would have to check my records to see when I was notified the picture had been awarded.

Q. Now, you not only had NOT AS A STRANGER at the time so that you couldn't play FOX FIRE, but you also considered FOX FIRE?

Mr. Sawyer: I am sorry, Mr. Nizer, but that is not the witness' testimony. The witness' testimony was to play FOX FIRE at the time that he was playing the reissue of the WIZARD OF OZ.

(1735)

Q. My recollection is that you testified, and I will leave it for tomorrow, we will have the minutes, that you testified that you even told Mr. Heiber that you had gotten NOT AS A STRANGER and therefore you could not play FOX FIRE. We will check the minutes tomorrow and see about it. Let us go on now so we do not have to read it back.

A. Yes, sir.

Q. You considered FOX FIRE a secondary picture, just a filler-in, didn't you?

A. Well, more than a filler-in. I put up cash for the picture. It had a good cast.

A. I honestly don't remember, sir.

Q. And your offer for HELL S ISLAND was three weeks?

A. That is right.

Q. You say you don't remember. I read to you from your testimony in this trial, on FOX FIRE.

What was the playing time?

A. A minimum of two weeks

A. Yes, sir.

Q. And on HELL'S ISLAND three weeks, right?

A. If that is what it says there, yes, sir.

Q. But actually you only had between the PRODIGAL, which was a Loew's picture and NOT AS A STRANGER one week of

(1736)

booking time; is that correct, sir?

A. A little more than that. I played PRODIGAL an extra day, eight days—nine days.

Q. And that was the week in which you put in WIZARD OF OZ?

A. Yes, sir.

Q. And you couldn't have put in FOX FIRE, which was to play two weeks, for a spot in which you only had one week, right?

A. That is right.

Q. So when you said a few moments ago that you intended to play FOX FIRE, where you played WIZARD OF OZ, that is incorrect, isn't it?

A. As far as that particular bid is concerned, yes.

Q. As far as any particular bid is concerned your statement was incorrect, wasn't it?

A. Yes, it would be.

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Q. SEVEN CITIES OF GOLD, you have testified about, which

(1737)

is a Twentieth Century-Fox picture, do you recall your testimony on ~~that~~, Mr. Wren?

A. Yes, sir.

Q. You were invited by Twentieth Century-Fox to bid for that picture, weren't you?

A. I believe we were.

Q. And you sent on September 12th, 1955, a notification—was it in a telegram again? Is that how you conduct your business, by telegram?

A. I don't know how it was, sir.

Mr. Sawyer: I think that is unnecessary, Your Honor.

By Mr. Nizer:

Q. You sent a notice that you would not bid, but would negotiate?

A. Yes, however we transmitted it, yes, sir.

Q. Now, you say that you really wanted that picture, SEVEN CITIES OF GOLD?

A. I have stated so, yes, sir.

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(1738)

Q. Did you say that you wanted SEVEN CITIES OF GOLD of Twentieth Century-Fox to play after the close of NOT AS A STRANGER?

A. Yes, sir.

Q. Was that what you wanted that picture booked in for, after NOT AS A STRANGER, is that right?

A. Yes, sir.

Q. And that would be about September 21st, 1955?

A. Yes, sir.

Q. Now, haven't you claimed at one time that you wanted SEVEN CITIES OF GOLD to play before NOT AS A STRANGER rather than after?

A. I may have.

Q. You not only may have, you did, didn't you?

Have you answered?

A. I don't recall, sir.

Q. Let me read it to you. Page 132, Universal deposition,

(1739)

where you gave this testimony:

> We had time to fill in between HIT THE DECK and NOT AS A STRANGER. We had time to fill in there because we had lost a picture called SEVEN CITIES OF GOLD to the Fox Theatre.

Now, do you recall testifying that the time that you had to fill in, that you had lost SEVEN CITIES OF GOLD was before NOT AS A STRANGER began to play?

A. That is a mistake, sir. I don't think the picture was available at that time.

Q. So this was incorrect testimony under oath when you gave it?

A. Yes, sir.

Q. Now, Mr. Wren, turning to another subject: Can anyone in your opinion, no matter how long in the business, rate a picture in advance?

A. I doubt it.

Q. You cannot say it is good, it is bad, it is indifferent, in advance, can you?

A. Box officewise?

Q. Yes, or any otherwise.

A. Oh, you can express an opinion as to whether it is good bad or indifferent as far as your personal feelings are concerned. I don't think you can tell the end result. In fact

(1740)

we know you can't.

Q. And box officewise the same thing?

A. Yes, sir.

Q. Well, haven't you testified to the opposite effect? Let me read to you page 535. You said:

Well, I would like to go on record, I don't think you can rate pictures.

The questioner said:

Well now, what do you mean by that?

And you said:

I don't think you can say they are good, bad, indifferent, fair or anything else until such time as the box office returns are in.

A. Didn't I just say that, Mr. Nizer?

Mr. Sawyer: That is what he just did say.

The Witness: I just said that.

By Mr. Nizer:

Q. I thought you told me that you cannot rate them in advance, but you told me that you could box officewise.

(1741)

By Mr. Nizer:

Q. I thought you told me that you cannot rate them in advance, but you told me that you could box office-wise.

A. No, I did not, sir.

Q. All right, let me continue on. If we agree, very well:

There have been any number of pictures that on the surface looked like they would be real blockbusters but did not perform at the box office.

A. Yes, sir.

Q. Although they met the critical acclaim. So I don't think there is any yardstick for good, bad, or indifferent. Right?

A. Yes, sir.

Q. So when you talk of the quality of pictures which you got or which your competitor got you don't know what that quality will be in a general way until after the picture has performed, is that right?

A. Certainly.

Q. And at the time that the company has to judge the bids and determine how the picture will do; let us say, a long run, we will give you 90 per cent of a long run, because, if it is only 90/10, the longer the picture runs, the better it is for the distributor, right?

(1742)

A. I don't understand that. If it is only 90/10, the longer the run the better for the distributor?

Q. Yes. Isn't that so? Isn't that correct?

A. If it is 90/10 the longer the run the better for the distributor?

Q. Sure, he gets 90 per cent after your house expense has been taken off each time, each week. So if it is a long run he gets at least 90 per cent of the surplus.

A. Oh, certainly, certainly.

Q. Haven't you so testified yourself?

A. Yes. No, I misunderstood, in the long run.

Q. And therefore when you are talking about quality in this courtroom, that they had a good picture and I had a bad picture, and vice versa, what you are saying is that you are being a Monday morning quarterback, so to speak, you are looking at the results in the box office after the picture is played, right?

A. No, Mr. Nizer, that is not the truth. No one could compare PICNIC and THE KILLERS or the KISS BEFORE DYING. Even in front of you you know that those things look better cast-wise and everything else. Now,

what the end result is going to be is an entirely different thing.

Now, PICNIC can come out and not do well, but on paper the potential is far greater with a picture with a

(1743)

decent cast than it is with these slough pictures that you mentioned here this morning.

Q. And on paper is what you try to make your bid for before you know how it is going to do?

A. Right, sir.

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(1745)

Q. Did you know at the time you made your $106,000 bid that the Trans-Lux had offered $100,000?

A. After I had made my bid, five minutes after I had made my bid is when the Trans-Lux called from New York, a Mr. Wolf, to put the bid through.

Q. Weren't the bids opened? They were opened in your presence?

A. But this one wasn't there to be opened, it was by telephone from Mr. Wolf of Trans-Lux. There was no bid there

(1746)

to be opened. All of the bidders that were there had theirs opened.

Q. And the bid that came in on the telephone—

A. Yes, sir.

Q. —I will accept it for the moment.

A. Right, sir.

Q. And I will agree.

A. Well, you check it.

Q. I will accept it for the moment. The bid that came in on the telephone was $100,000 from the Trans-Lux, wasn't it?

A. Mr. Diamond—

Q. Well, just answer my question.

A. According to Mr. Diamond. It is only hearsay with me.

Q. And you heard that bid was offered?

A. Yes, that is what he told me.

Q. In your presence.

Now, my next question is, therefore THE MAN IN THE GRAY FLANNEL SUIT looked so good to you on paper that you really put up a very large guarantee in that case, didn't you?

A. That was one of the contributing factors, yes, sir.

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